

APPENDIX

123 23 1974

IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-726

COOPER STEVEDORING COMPANY,

Petitioner

v.

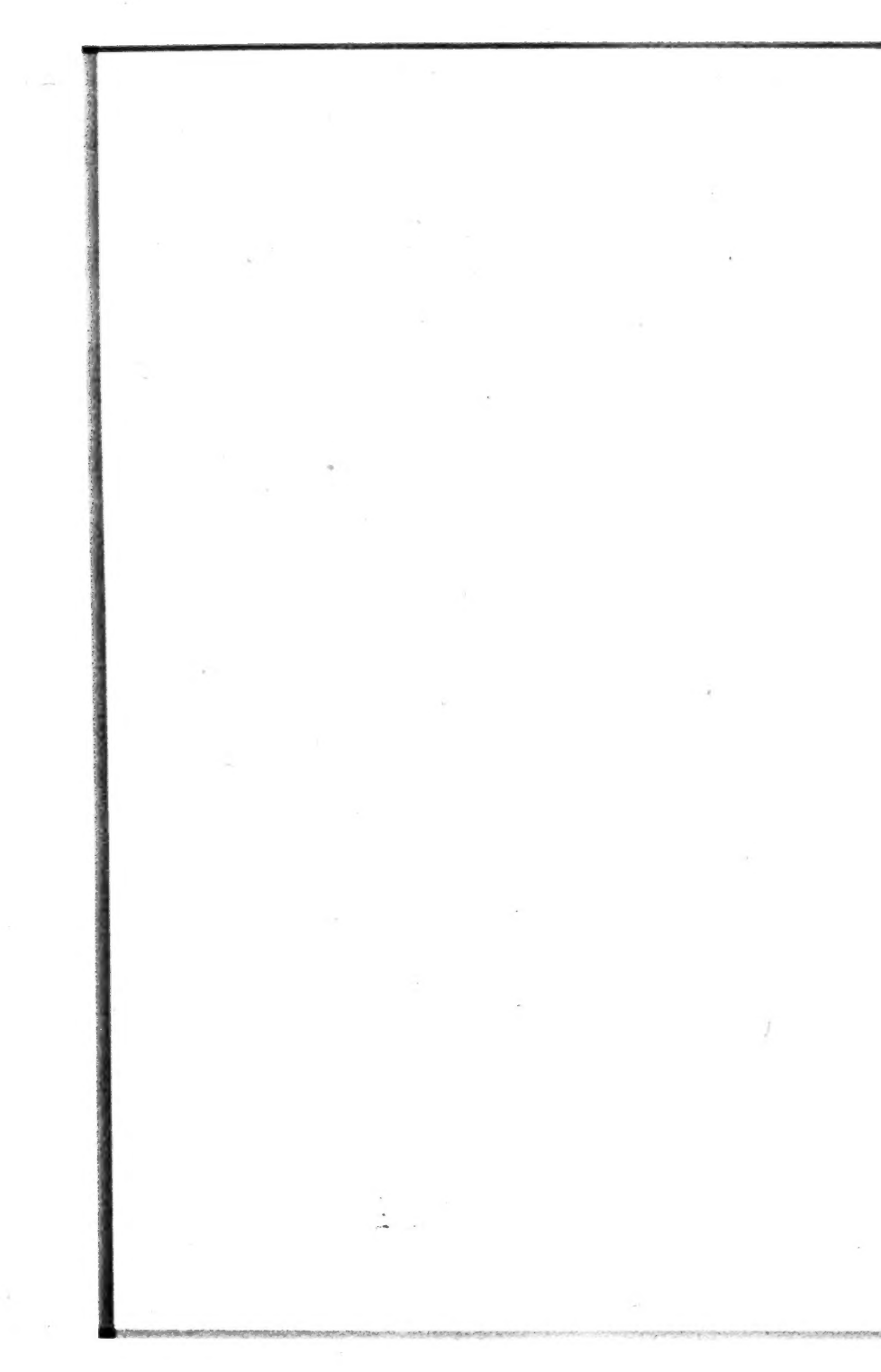
FRITZ KOPKE ET AL.,

Respondents

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

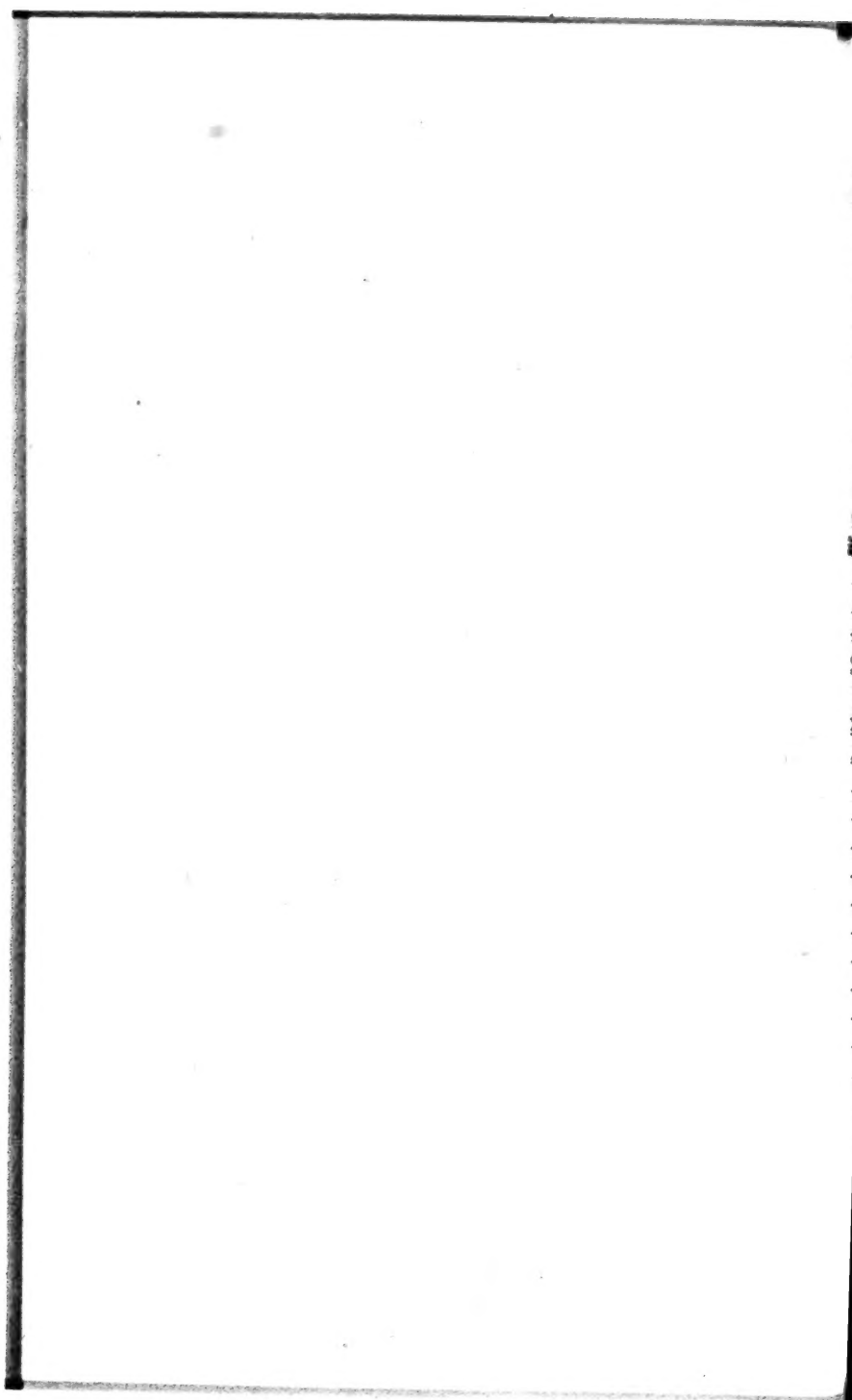
January 7, 1974

PETITION FOR CERTIORARI FILED NOVEMBER 2, 1973
CERTIORARI GRANTING JANUARY 7, 1974



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69-H-1214

DOCKET

JURY REQUESTED

Closed 11-30-71 JS-C made
JUDGE JOHN V. SINGLETON, JR.

TITLE OF CASE

TROY M. SESSIONS

VS.

FRITZ KOPKE

VS

COOPER STEVEDORING (3rd prty)

dismissed

BASIS OF ACTION: PERSONAL INJURIES - LONGSHOREMAN. SEEKS
\$50,000.00, INTEREST & COSTS. UNDER RULE 9(h)

JURY TRIAL CLAIMED BY 3rd PARTY DEF.

ON MAY 5, 1970

ATTORNEYS

For Plaintiff: BROCK & WILLIAMS
Warner Brock, 250 THE MA
BLDG., CITY 77002

For Defendant: Dixie Smith
FULBRIGHT, CROOKER & JAWO
Bank of the Southwest Bld
Houston, Texas 77002

COOPER STEVEDORING CO
One Shell Plaza, Houston
Texas 77002

1970	PLAINTIFF'S ACCOUNT	RECEIVED	DISBURSED	DATE	DEFENDANT'S ACCOUNT	RECEIVED	DISBURSED
	E. LOBROCK & WILLIAMS	\$15 00		12-3-71	3rd Prty Deft. Cooper Stevedoring		
12-6-71	CD 1-16		15 00		Notice of Appeal	5 00	
		15 00	15 00	12/10/71	CD 1-17		5 00
				12/15/71	CD 1-17-71/a	5 00	
				12/16/71	CD 1-17		5 00

ABSTRACT OF COSTS

TO WHOM DUE

AMOUNT

RECEIPTS, REMARKS, ETC.

63-H-1214

JUDGE JOHN V. SINGLETON,

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
1969		
DEC. 10	COMPLAINT, FILED IN DUPLICATE.	
" "	COST BOND, \$250.00, FILED IN DUPLICATE.	
" "	SUMMONS WITH COPY DO & COPY OF COMPLAINT ATTACHED, ISSUED & DE-	
" "	LIVERED TO U.S. MARSHAL FOR SERVICE.	
" 15	SUMMONS RETURNED & FILED, EXECUTED ON 12/10/69.	
12-23-69	PLAINTIFF'S FIRST AMENDED ORIGINAL COMPLAINT, filed.	
12-23-69	TWO SUMMONS ISSUED.	
1-7-70	Both Summons returned and filed. BOTH executed 12-29-69	
2/27/70	Defts. Answer. filed.	
"	Cost Bond. filed.	
4/6/70	Deft.'s Motion to implead 3rd party. filed. M/D 4/13/70	
4-21-70	(UVA) ORDER AMENDING SUBMISSION OF THIRD PARTY DEFENDANTS. filed	
	and entered.	
4-21-70	THIRD PARTY COMPLAINT (Mid-Gulf Stevedores), filed.	
4-21-70	THIRD PARTY COMPLAINT (Cooper Stevedoring), filed.	
4-21-70	THIRD PARTY SUMMONS (Mid-Gulf Stevedores) ISSUED.	
4-21-70	THIRD PARTY SUMMONS (Cooper Stevedoring) ISSUED.	
5/5/70	Original Answer of 3rd party Deft. Mid-Gulf Stevedores. Filed & JURY DEMAND THEREON.	
MAY 11	3rd PARTY SUMMONS RETURNED & FILED, EXECUTED ON 4/23/70.	
" "	DEF'S. MOTION TO STRIKE JURY DEMAND OF 3rd PARTY DEF., FILED IN	
" "	DUPLICATE.	
" "	MAY 25, 1970	
" "	BRIEF IN SUPPORT OF DEF'S. MOTION TO STRIKE 3rd PARTY DEF'S.	
" "	JURY DEMAND, FILED IN DUPLICATE.	
" "	3rd PARTY SUMMONS RETURNED & FILED, EXECUTED ON COOPER STEV.ON	
" "	4/24/70.	
5-12-70	Motion of Cooper Stevedoring Company, Inc. to dismiss for want of jurisdiction filed in duplicate	
5-12-70	Notice of submission filed in duplicate (M/D 5-18-70)	
5-14-70	Affidavit of Ervin S. Cooper (Ex. "A" to above motion), filed.	
5-15-70	Defendant-third party plaintiffs reply to Cooper Stevedoring Co. Inc., motion for dismissal, filed in dup	
5-15-70	Affidavit of E.C. Faerber, filed in dup	
5-15-70	Brief in opposition to third-party defendant's motion to dismiss for want of jurisdiction, filed in dup	
5-20-70	Defendant-Third Party plaintiff's interrogatories, filed in dup	

DATE	PROCEEDINGS
6-8-70	Motion of Cooper Stevedoring Co., Inc. to dismiss for want of Jurisdiction, DENIED. Defendant's motion to strike third party defendant's jury demand, GRANTED. JVSJR.
6-8-70	Parties notified. rm.
6-15-70	Answer of third party defendant Cooper Stevedoring Co. Inc., to interrogatories heretofore propounded by defendant third party plaintiff, filed in dup
6-15-70	Deposition of Troy M. Sessions, filed
9-21-70	Pretrial held. Frank Harmon was not present for the pretrial. Attorneys to complete discovery by January 1, 1971 and the case will be set on the Court's first trial docket in 1971. JVSJR:rm Parties notified.
3-24-71	Motion for Physical Examination, filed. M/D 3-29-71
4-21-71	Answer of Third-Party Def., Cooper Stevedoring Co., Inc., filed. (Pltf.) MOTION WAS GRANTED to substitute counsel. (Pltf.) Parties notified. Parties ntfd. by c/c mm
10-14-71	(JVS) ORDER OF DISMISSAL of 3rd Party Defendant MID-GULF STEVEDORES, INC., signed & filed (parties notified by c/c, rlo)
11-2-71	(JVS) 1ST DAY OF TRIAL BEFORE THE COURT: Witnesses sworn and the rule invoked. Plaintiff's testimony begins.
11-3-71	(JVS) 2ND DAY OF TRIAL BEFORE THE COURT: Plaintiff's testimony continues. Plaintiff rests. Defendant's testimony begins. Defendant rests. Court finds for plaintiff in the sum of \$37,125 plus \$1,554.90 medical less lein of \$987.32.
11-30-71	(JVS) ORDER: Pltf. recovers \$38,679.90 from Defts. Fritz Kopke, Inc. and Alcoa Steamship Co. LESS \$987.32 to be paid to Texas Employers Insurance Assn.; Defts. Fritz Kopke, Inc. and Alcoa Steamship Co. recover \$19,339.95 from 3rd Party Def. Cooper Stevedoring Co., Inc.; Costs taxed one-half to defts. and one-half to 3rd party def., filed. Parties ntfd. by c/c. mm
12-2-71	NOTICE OF APPEAL by 3rd Party Def. Cooper Stevedoring Co., Inc., filed. Clerk served copies on other parties. mm
12-8-71	Notice of Appeal on behalf of Fritz Kopke, Inc., et. al., Defts., filed. (Copies mailed to other Parties.)
12/20/71	Plf.'s Satisfaction of Judgment. filed.
12-29-71	Def. Fritz Kopke, Inc. and Alcoa Steamship Co. MOTION for Additional Findings of Fact, filed. M/D 1-10-72 mm
1-5-72	Cost Bond on Appeal for Def. FRITZ KOPKE, INC., filed.
1-6-72	Transcript of Findings of Fact and Conclusions of Law made by JVS on 11-3-71, filed. mm
1-6-72	(JVS) Order Extending Time for Docketing Record on Appeal, filed.
1-11-72	3rd Party Def. Cooper's REPLY IN OPPOSITION TO MOTION of Defts Fritz Kopke, Inc. & Alcoa, For Additional Findings of Fact, filed. (rlo)
1-13-72	Cost Bond on Appeal on behalf of Cooper Stevedoring Co., filed.
1-13-72	Defts. Fritz Kopke, Inc. and Alcoa Steamship Co. Reply in Support of their Motion for Additional Findings of Fact, filed. mm
2-29-72	Reporter's Transcript of Proceedings, filed.
2-29-72	Record on Appeal consisting of all ORIGINAL PAPERS, EXHIBITS, ONE DEPOSITION and Reporter's transcript mailed to Ct. of Appeals.
8-15-73	Original Papers, Exhibits and Deposition returned from Ct. of Appeals.
8-15-73	JUDGMENT (or Mandate) of Court of Appeals, rec'd & filed. (Judgment of Dist. Court "AFFIRMED".)

PXXK

IN THE

OCTOBER TERM, 1973

No. 73-726

COOPER STEVEDORING COMPANY,

Petitioner

v.

FRITZ KOPKE ET AL.,

Respondents

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

PETITION FOR CERTIORARI FILED NOVEMBER 2, 1973
CERTIORARI GRANTED

January 7, 1974

[280] **PLAINTIFF'S SECOND AMENDED
ORIGINAL COMPLAINT**
(Caption Omitted)

NOW COMES the Plaintiff, Troy M. Sessions, complaining of Defendants, Fritz Kopke and/or Alcoa Steamship Company, and with leave of Court first had and obtained, files this his Second Amended Original Complaint, and would show the Court the following:

I

That at all times hereinafter mentioned the defendant, Fritz Kopke, was and still is a corporation, having an office and agent for service with Central Gulf Steamship Corporation, Houston First Savings Building, Houston,

Texas; and an office and agent for service with Furness, Withy & Company, Ltd., World Trade Building, Houston, Texas, where they were served with citation in this cause.

That at all times hereinafter mentioned the defendant, Alcoa Steamship Company, was and still is a corporation, having an office and agent for service with Dalton Steamship Company, World Trade Building, Houston, Texas, where they were served with citation in this cause. The Defendants, Fritz Kopke and/or Alcoa Steamship Company, have appeared by and through their attorneys of record and filed their answers herein.

II.

That at all times hereinafter mentioned the plaintiff was and still is a citizen of the State of Texas and resides in Houston, Texas in the Southern District of Texas.

[281]

III.

Jurisdiction and venue lies in this Court.

IV.

On or about July 2, 1969, the defendant, Fritz Kopke and/or Alcoa Steamship Company, owned and/or managed, operated, manned, provisioned, supervised and controlled the "S/S Karina", and at all times material hereto such vessel was situated upon the navigable waters of the United States and in navigation at a dock at the Port of Houston, Texas, and plaintiff was employed as a longshoreman in the service of the vessel, performing the services of a seaman.

V.

Plaintiff would show that at such time and on such occasion, the area of the "S/S Karina" where plaintiff was working at the time and on the occasion in question was

unseaworthy as that term is known in law, which unseaworthiness caused his injuries.

VI.

Cumulative of the foregoing, but still insisting upon the same, plaintiff would show that the defendants, Fritz Kopke and/or Alcoa Steamship Company, their agents, servants and/or employees, were negligent at the time and on the occasion in question and such negligence caused or contributed to cause his injuries.

VII.

By reason of the unseaworthiness of the vessel and/or the negligence of the defendants, their agents, servants and/or employees, plaintiff has sustained injuries, physical pain, mental anguish, disability, loss of earnings and has been caused to incur medical and hospital services, with resulting expenses, all of which will continue in the future, and therefore has and will sustain damages in the sum of \$150,000.00.

[282] WHEREFORE, PREMISES CONSIDERED, plaintiff prays that upon trial hereof he have judgment against the defendants, jointly and severally, in the sum of \$150,000.00, interest, his costs of Court, and such other and further relief, special and general, legal and equitable, to which he may show himself justly entitled.

BROCK & WILLIAMS

By: /s/ **WARNER F. BROCK**

Warner F. Brock

250 The Main Building

Houston, Texas 77002

224-6433

Attorneys for Plaintiff

[456] THIRD PARTY COMPLAINT**(Caption Omitted)****(Filed April 2, 1970)****TO THE HONORABLE JUDGES OF SAID COURT:**

Comes now, Fritz Kopke, one of the Defendants in the above cause, hereinafter referred to as Defendant-Third Party Plaintiff, complaining of Cooper Stevedoring Company, Inc., hereinafter referred to as either the stevedore or Third Party Deendant, and files this its Third Party Complaint and would show as follows:

I.

Troy M. Sessions, hereinafter referred to as Plaintiff, has filed an Original Complaint and an Amended Complaint, complaining of Defendant-Third Party Plaintiff, a copy of said Complaints are attached hereto and marked "Exhibit A" and "Exhibit B" respectively for all purposes.

II.

Defendant-Third Party Plaintiff is a business organization duly organized and existing under law.

III.

Third Party Defendant, Cooper Stevedoring Company, Inc., is a corporation whose principal office and place of business is P. O. Box 1566, Milner Building, Mobile, Alabama 36601, [457] and has no registered agent for service of process within the State of Texas, but who has transacted business within the State of Texas as defined by the statutes of this State, and by reason of the above mentioned activities, and, pursuant to Article 2031 (b), of Vernon's Annotated Texas Statutes, appointed the Secretary of State of the State of Texas as its agent for service

of process upon whom service upon the said Third Party Defendant may be had.

IV.

Plaintiff has alleged in substance in his Complaints that on or about July 2, 1969, he was injured while working onboard the SS KARINA, as a longshoreman while in the employ of Midgulf Stevedores, Inc., as a result of the negligence of Defendant-Third Party Plaintiff and/or because of the unseaworthiness of the vessel, for which Plaintiff is claiming damages in the sum of FIFTY THOUSAND AND NO/100 (\$50,000.00) DOLLARS. The Original Complaint and Amended Complaint, copies of which are attached hereto as "Exhibit A" and "Exhibit B" are referred to and incorporated herein for more particular description of the claim being made by the Plaintiff.

V.

Prior to the date of the alleged accident, a contract was entered into with the Third Party Defendant, Cooper Stevedoring Company, Inc., to load cargo aboard the vessel at Mobile, Alabama, and the said vessel was then made available to the stevedore so that it could fulfill its obligations under the contract for the stevedoring work. Third Party Defendant was contractually obligated to Defendant-Third Party Plaintiff to perform its work of loading the cargo aboard the vessel with reasonable care and reasonable prudence under the circumstances, and to perform the stevedoring work in a reasonably safe and workmanlike manner.

[458]

VI.

Defendant-Third Party Plaintiff alleges that at all times material hereto the Third Party Defendant was an inde-

pendent contractor and was the employer of all men engaged in loading activities aboard the vessel at Mobile, Alabama, and that the stevedore was in full control of that part of the vessel complained of by the Plaintiff during loading activities, as well as all workmen employed in connection therewith. That said Third Party Defendant had full custody and control of that part of the vessel and the employees working there, and had the sole right and authority to control the workmen at Mobile in the work of loading the vessel, and said Defendant-Third Party Plaintiff had no control over said work, and at no time were the men who loaded cargo at Mobile employees of Defendant-Third Party Plaintiff, nor did the Defendant-Third Party Plaintiff have any authority to control or direct the Mobile longshoremen in the details of the work performed.

VII.

Defendant-Third Party Plaintiff alleges that if Plaintiff did in fact sustain injuries proximately caused by any unseaworthy condition of the vessel, which is not admitted but expressly denied, then Defendant-Third Party Plaintiff alleges that such condition resulted from the conduct on the part of Cooper Stevedoring Company, Inc., through its agents, servants and employees, acting within the course and scope of their employment.

VIII.

Defendant-Third Party Plaintiff alleges that if the Plaintiff sustained any injuries as the result of negligence other than his own, which is not admitted, but is expressly denied, then such negligence was the result of conduct on the part of Cooper Stevedoring Company, Inc., its agents, servants, or [459] employees, acting in the course and scope of their employment, and the officers and crew of the vessel were in no way negligent.

IX.

Defendant-Third Party Plaintiff alleges that if the Plaintiff's injuries resulted from the unseaworthiness of the vessel or the negligence of Defendant-Third Party Plaintiff, which is not admitted, but is expressly denied, then such unseaworthiness or negligence was proximately caused by the failure of Cooper Stevedoring Company, Inc. to perform its contractual obligations owed Defendant-Third Party Plaintiff, and by reason thereof Cooper Stevedoring Company, Inc. is liable to indemnify Defendant-Third Party Plaintiff for any damages that it may be required to pay because of the Complaints filed herein by Plaintiff, including reasonable attorneys' fees, court costs and disbursements, for all of which it asks recovery against Cooper Stevedoring Company, Inc.

WHEREFORE, PREMISES CONSIDERED, Defendant-Third Party Plaintiff, Fritz Kopke, prays that citation issue and be served upon the said Third Party Defendant in the form and manner required by law, requiring the Third Party Defendant to appear and answer herein; that upon a final hearing hereof, Plaintiff take nothing against it, and that it be awarded judgment over and against Third Party Defendant for all of its damages, with interest, costs, disbursements and reasonable attorneys' fees, and have such other and further relief to which it may show itself justly entitled.

ROYSTON, RAYZOR & COOK

By /s/ GUS SCHILL, JR.

Gus Schill, Jr.

877 San Jacinto Building

Houston, Texas 77002

Attorneys for Defendant-

Third Party Plaintiff,

Fritz Kopke

[290]

PRE-TRIAL ORDER

(Caption Omitted)

The above styled and numbered admiralty cause came on prior to trial for entry of a pre-trial order, and it being made known to the Court that the parties have agreed on an order, the following pre-trial order was entered more than ten (10) days preceding date of trial which is to be held in Houston, Texas before the Honorable John V. Singleton, Jr., Judge, on April 6, 1971.

I.

There is no jurisdictional questions except that third party defendant, Cooper Stevedoring Company is asserting lack of jurisdiction contending it has no agent in this State and has never done business in this State.

II.

In general, Plaintiff claims that he was working as a long-shoreman employed by Mid-Gulf Stevedores, Inc. aboard the SS KARINA, a vessel owned and operated by Fritz Kopke, Inc. and/or Alcoa Steamship Company, hereinafter referred to as Defendants- [291] Third Party Plaintiffs, said vessel being docked in the Port of Houston on July 2, 1969, which is the date Plaintiff was injured due to the unseaworthiness of said vessel and the negligence of the Defendants-Third Party Plaintiffs. Plaintiff contends that the vessel was unseaworthy, and Defendants-Third Party Plaintiffs were negligent, in requiring Plaintiff to work on a floor of crates which was not solid and which had holes between the crates. Plaintiff stepped into a hole located between two such crates and fell injuring his back and other parts of his body. As a result of the alleged injuries received, Plaintiff has been treated by Dr. A. C. Madsen,

Dr. Ed Smith, Dr. T. O. Moore, and Dr. Robert J. Goodall. Plaintiff is claiming damages in the sum of \$50,000.00.

In general Defendants-Third Party Plaintiffs contend that:

1. That the Defendants, Fritz Kopke, Inc. and/or Alcoa Steamship Company, were not negligent.
2. That the SS KARINA was not unseaworthy.
3. Alternatively, that the negligence, if any, of the Defendants and/or the unseaworthiness of the SS KARINA, if any, did not proximately cause or contribute to Plaintiff's injuries, if any.
4. That Plaintiff's failure to exercise ordinary care for his own safety was a sole cause of the accident made the basis of this suit.
5. That the Plaintiff, Troy M. Sessions, was negligent, and that such negligence caused or contributed to his injuries, if any, and that any award for damages, if any, made to the Plaintiff should be reduced by the percentage to which his own negligence contributed to his injuries.
6. Alternatively, that Plaintiff's injuries, if any, resulted from an unavoidable accident.
- [292] 7. That Plaintiff's injuries, if any, were proximately caused by the negligent acts and omissions of the two Third Party Defendants, their agents, servants, and employees for whom Defendants-Third Party Plaintiffs are not responsible, and that as a matter of law, such negligence on the part of the Third Party Defendants, their agents, servants, or employees, will entitle the Defendants-

Third Party Plaintiffs to recover indemnity from the Third Party Defendants, for all damages costs, attorneys' fees and disbursements incurred by Defendants-Third Party Plaintiffs.

8. That Plaintiff had pre-existing conditions which caused and/or contributed to his present disability, and that the amount of any award made herein to Plaintiff, if any, should be reduced by the percentage to which such pre-existing physical conditions caused or contributed to his present disability, if any.

9. That the Third Party Defendants have breached their contractual obligations owed to the Defendants-Third Party Plaintiffs and the SS KARINA and that such breach entitles the Defendants-Third Party Plaintiffs to recover full indemnity from the Third Party Defendants, for all damages, costs, disbursements, attorneys' fees, etc.

10. That the negligence of the Plaintiff, Troy M. Sessions, was a proximate cause or contributed to cause his alleged injuries and as a matter of law, such negligence constitutes a breach of the Third Party Defendant, Mid-Gulf Stevedores, Inc., of its contractual obligations to perform its work aboard the SS KARINA with reasonable care and prudence, and in a reasonably safe manner, and that such negligence of the Plaintiff, as a matter of law, entitles the Defendants-Third Party Plaintiffs to recover indemnity from the said Third Party Defendant.

[293] 11. That Defendants-Third Party Plaintiffs are entitled to recover indemnity from Third Party Defendants for all damages awarded to Plaintiff, in the event Defendants-Third Party Plaintiffs are liable to Plaintiff in any respect and are entitled to further recover indemnity for all costs, disbursements, attorney's fees and expenses incurred in connection with the defense of Plaintiff's claim

irrespective of whether any recovery is made by Plaintiff in this case.

In general, Mid-Gulf Stevedores, Inc. and Cooper Stevedoring Company, Inc., hereinafter referred to as Third Party Defendants, contend:

Third Party Defendants say that the negligence of the Plaintiff was a sole cause, or in the alternative, a cause of the Plaintiff's damages, if any. Third Party Defendants further state that the damages, if any, sustained by the Plaintiff were the results of an unavoidable accident. Third Party Defendants deny that they breached any contractual duties of any character owed to Third Party Plaintiffs, and urge that if Plaintiff's injuries were caused by any substandard conduct or condition other than his own, that it was that of Third Party Plaintiffs, and that Third Party Defendants did not breach any warranty of workmanlike service, and that any substandard conduct or condition or action by Third Party Plaintiffs was of such nature as to bar recovery of indemnity.

III.

STIPULATIONS

1. It is stipulated and agreed that the SS KARINA was owned and operated by Fritz Kopke, Inc. and/or Alcoa Steamship Company at all times material to this lawsuit.

2. It is stipulated and agreed that on July 2, 1969, Plaintiff was employed by Mid-Gulf Stevedores, Inc. as a longshoreman and that he was aboard the SS KARINA at Houston, Texas on July 2, 1969, pursuant to the work of his employer.

[294] 3. Texas Employers Insurance Association, the compensation carrier for Mid-Gulf Stevedores, Inc. has paid Plaintiff weekly compensation benefits in the amount

of \$..... and, further said compensation carrier has paid medical benefits in the amount of \$....., and has a right to recover by way of subrogation for such compensation and medical expenses so paid in accordance with the Longshoremen's & Harbor Workers' Compensation Act from any monies awarded Plaintiff in this cause of action, if any.

IV.

There are no contested issues of law.

V.

EXHIBITS

Attorneys agree that exhibits may be introduced into evidence providing opposing counsel are first permitted to inspect such exhibits and before any tender of the exhibit is made for identification or introduction. In this regard, it is stipulated that all hospital records may be admitted without formal proof of their authenticity. Furthermore, any x-rays and laboratory tests made in connection with the examination and treatment of the Plaintiff may be admitted by any party without formal proof of their authenticity or by proof of the technician making them. Also the dock and medical log of the SS KARINA including their English Translations and the ship's cargo storage plan may be admitted by any party without formal proof as to their authenticity.

A. It is anticipated that the following exhibits will be introduced by Plaintiff in the trial of this case.

1. Bill of Dr. Robert J. Goodall in the amount of \$590.00.
2. Bills of Memorial Baptist Hospital totaling \$718.90.
3. Bills of Memorial Radiology Associates totaling \$86.00.

[295] 4. Bills of Leidler and Associates (Laboratory Medicine) totaling \$32.00.

5. Bill of M.D. Anesthesia in the amount of \$78.00.

6. Hospital records of Memorial Baptist Hospital.

7. Income tax records of Troy M. Sessions for the years 1968 through 1970.

8. Portions of U.S. Coast Guard and Safety & Health regulations for longshoring and the storage of cargo.

B. It is anticipated that the Defendant may introduce into evidence the following exhibits:

1. Certain hospital and medical records including laboratory tests, etc.

2. Plan of the hold of the vessel.

3. The Logs of the SS KARINA.

4. Accident reports of the stevedore.

5. Weekly wage records of Plaintiff.

C. Third Party Defendants may offer into evidence the following:

1. Certain medical and hospital records including laboratory tests, etc.

2. Accident reports of stevedore.

3. Weekly wage record of Plaintiff.

4. Logs of the SS KARINA.

5. Ship's cargo storage plan of the hold in question.

VI.

WITNESSES

A. The Plaintiff may call as witnesses the following:

1. The Plaintiff.

2. Tom Harper, the foreman for plaintiff who was allegedly present.

[296] 3. J. R. Hunt, T. G. Gant and W. H. Freeman, co-workers allegedly present.

4. Dr. Robert J. Goodall, a local neurosurgeon who has operated on and most recently seen and treated Plaintiff for his injuries.

B. The Defendants may call as witnesses the following:

1. Members of the longshore gang and supervisory personnel of stevedores, as listed.

2. Dr. A. C. Madsen.

3. Dr. Ed Smith.

4. Dr. T. O. Moore.

C. The Third Party Defendants may call as witnesses the following:

1. Members of the longshore gang and supervisory personnel of stevedores, as listed.

2. Dr. A. C. Madsen.

3. Dr. Ed Smith.

4. Dr. T. O. Moore.

VII.

All discovery has been completed.

VIII.

All motions and other ancillary matters have been completed.

IX.

All signed written statements of parties and witnesses contained in the files of Plaintiff, Defendants-Third Party Plaintiffs and Third Party Defendants, if any, have been exchanged and copies of same filed with Court.

X.

This case will be an admiralty case, therefore no jury is needed.

[297]

XI.

Settlement offers have been exhausted.

APPROVED AND ENTRY REQUESTED:

[Signatures Omitted]

[509]

ORDERED

(Caption Omitted)

(Filed November 30, 1971)

BE IT REMEMBERED that on the 2nd day of November, 1971, came on to be heard the above entitled and numbered cause, and the parties continued to introduce evidence until the 3rd day of November, 1971, when all parties announced in open court that they had rested their cases. Thereupon the Court, after considering the pleadings, and pretrial order, the evidence, and after hearing argument of counsel, stated that he found for the plaintiff and against the defendants are entitled to recover in contribution Co., finding that the plaintiff, Troy M. Sessions, sustained damages in the total sum of \$38,679.90, finding also that the defendants are entitled to recover in contribution against Cooper Stevedoring Company, Inc., third-party defendant, the sum of \$19,339.95, and further finding that Texas Employers Insurance Association, the compensation carrier for plaintiff's employer, had paid weekly compensation benefits in the amount of \$626.07 and medical benefits in the sum of \$361.25, or a total of \$987.32, and that Texas Employers Insurance Association is entitled to recover the sum of \$987.32 from the sum of money awarded the plaintiff, and it is, therefore, accordingly,

ORDERED, ADJUDGED and DECREED that the plaintiff, Troy M. Sessions, do have and recover of and from the [510] defendants, Fritz Kopke, Inc. and Alcoa Steamship Co., the sum of \$38,679.90, and it is, further,

ORDERED, ADJUDGED and DECREED that out of such sum of money awarded the plaintiff, Texas Employers Insurance Association is hereby granted a recovery of \$987.32, which sum of money the defendants shall pay

directly to Texas Employers Insurance Association out of the plaintiff's recovery of \$38,679.90, and it is further,

ORDERED, ADJUDGED and DECREED that the defendants, Fritz Kopke, Inc. and Alcoa Steamship Co., are entitled to contribution against Cooper Stevedoring Company, Inc., third-party defendant, in the sum of \$19,339.95.

It is further ORDERED, ADJUDGED and DECREED that all costs herein are taxed one-half to the defendants and one-half to the third-party defendant.

ENTERED and EXECUTED this 30th day of November, 1971.

/s/ JOHN V. SINGLETON, JR.
John V. Singleton, Jr.
United States District Judge

APPROVED AS TO FORM:

[Signatures Omitted]

EXHIBIT A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1467

TROY M. SESSIONS,

Plaintiff-Appellee,

v.

FRITZ KOPKE, INC., ET AL,

*Defendants-Third Party
Plaintiffs-Appellees and
Cross Appellants,*

v.

COOPER STEVEDORING COMPANY, INC.,

*Third Party Defendant-
Appellant and Cross Appellee.*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS

(June 1, 1973)

Before MORGAN, CLARK and INGRAHAM,
Circuit Judges.

INGRAHAM, Circuit Judge: The SS KARINA, a vessel owned and operated by Fritz Kopke, Inc., and under charter to the Alcoa Steamship Company, was loaded with palletized crated cargo by the employees of Cooper Stevedoring Company at Mobile, Alabama. The KARINA departed Mobile and arrived at Houston on or about July 2, 1969, where employees of Mid-Gulf Stevedores, Inc., prepared to load sacked cargo.

Troy Sessions, a longshoreman employed by Mid-Gulf, was one of the first men to enter the hold of the ship. The Mid-Gulf employees were required to walk atop the previously loaded palletized crates in order to store the cargo they were bringing aboard ship. Sessions stepped into an opening between two crates which was concealed by a covering of corrugated paper, and thereby sustained certain personal injuries.

Sessions brought an action against Fritz Kopke and the Alcoa Steamship Company (collectively referred to as the vessel) seeking to recover damages for his injuries. The vessel in turn sought indemnity against Mid-Gulf and Cooper. Prior to trial the vessel compromised and settled its claim against Mid-Gulf, which was then dismissed from the suit. After a trial to the court, sitting without a jury, the vessel was found to be unseaworthy and damages were awarded to the plaintiff in the amount of \$38,679.90. No one appeals from this award. The court found that Cooper had negligently stowed the cargo it loaded in Mobile and had thus breached the warranty of workmanlike performance it owed to the vessel. Denying the vessel's claim for a full indemnity, the court awarded the vessel contribution from Cooper as a joint tort-feasor for 50% of the damages.

Cooper appeals. The vessel cross-appeals, contending that there was no basis for the trial court's denial of its claim to full indemnity from Cooper. While our appellate review of this case is made somewhat difficult by the fact that neither the vessel nor Cooper requested that the trial court make formal findings of fact or conclusions of law which specifically dealt with the various rights and liabilities of the parties, nevertheless, we find ample basis for this holding in the oral decision announced by the judge at the conclusion of the case. Fairly read, the holding does make it clear that the court considered the vessel's conduct precluded its full recovery on the indemnity claim because it failed to fulfill its primary responsibility under its arrangement with Cooper to assure that some type of dunnage was placed on top of the cargo. On the record before us we cannot conclude that this finding was clearly erroneous.

On its appeal Cooper Stevedoring asserts that the trial court's award of contribution in a non-collision maritime case is in direct conflict with the Supreme Court's decisions in *Halcyon Lines, et al v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), and *Atlantic Coast Line R. Co. v. Erie Lackawanna R. Co.*, 406 U.S. 340 (1972).

Halcyon, supra, held that there was no right to contribution between a shipowner and a shoreside contractor who are joint tort-feasors in a case involving injuries to an employee of the contractor while engaged in repair work on a ship. The apparent prohibition against contribution in a non-collision maritime case has been held inapplicable where the joint tort feasor against whom contribution is sought is not immune from tort liability by statute. *Horton & Horton, Inc. v. T/S J. E. Dyer*, 428 F.2d 1131 (5th Cir., 1970), cert. den. 400 U.S. 993 (1971); *Watz v. Zapata Offshore Company*, 431 F.2d 100 (5th Cir., 1970); *In re*

Seaboard Shipping, 449 F.2d 132 (2nd Cir., 1971), cert. den. 406 U.S. 949 (1972).

In the present case Sessions, in addition to suing the vessel, could have proceeded directly against Cooper Stevedoring as Cooper was not his employer and, therefore, not shielded by the limited liability of the Longshoremen and Harbor Workers Act.

The Supreme Court's per curiam affirmance of the *Atlantic* case, *supra*, in no way necessitates a reexamination of our prior holdings. An examination of the district court's opinion in that case (reported at 315 F.Supp. 357 [1970]) indicates that the employer against whom contribution was sought enjoyed statutorily imposed limited liability and, therefore, would have fallen without our *Horton-Watz* exception to the *Halcyon* rule.

Finding both parties' additional assertions of error without merit, we therefore AFFIRM the judgment of the district court.

AFFIRMED.

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 72-1467

ON PETITION FOR REHEARING

(August 6, 1973)

Before MORGAN, CLARK and INGRAHAM,
Circuit Judges.

INGRAHAM, Circuit Judge: The court, having received a petition for rehearing in the above entitled and numbered cause, modifies its opinion of June 1, 1973, by deleting the eighth paragraph thereof. In its place the court substitutes the following paragraph:

The Supreme Court's per curiam affirmance of the *Atlantic* case, *supra*, does not necessitate a reexamination of our prior decisions. It is unclear from the district court's opinion, 315 F.Supp. 357 (S.D.N.Y., 1970), as well as from the Second Circuit's affirmance thereof,

442 F.2d 357 (1971), whether our *Horton-Watz* exception to the *Halcyon* rule was even applicable under the facts of *Atlantic*. Moreover, neither court directly questioned the decisions in *Horton* and *Watz*. In these circumstances and absent a reference in the Supreme Court's short per curiam opinion to these decisions, we do not read *Atlantic* as silently overruling *Horton* and *Watz*.

In all other respects the petition for rehearing is DENIED.

TESTIMONY

[14] **TROY M. SESSIONS,**

the Plaintiff, was called as a witness in his own behalf and, having been first duly sworn, was examined and testified upon his oath as follows:

DIRECT EXAMINATION

By Mr. Brock:

. . .

[15] Q. By Mr. Brock) State your name, please, sir.
A. Troy Marvin Sessions.

. . .

[16] Where do you live, Mr. Sessions? A. 9409 Chesterfield.

Q. In Houston? A. Houston, Texas.

Q. How old are you? A. Fifty-four years old.

Q. When did you turn fifty-four? A. April 21st, 1971.

Q. What extent of education have you had? A. High School education.

Q. Did you finish High School? A. Yes, sir, I finished High School.

Q. Where did you finish? A. Rusk, Texas.

Q. In what year? A. 1940.

. . .

[20] Q. Now, with respect to the types of — strike that.

On what day was it that you got injured, that's made the basis of this suit? A. July the 2nd, 1969.

Q. And what ship were you on? A. I was on the

"S.S." — I believe that is pronounced "Karuda." "Karuda." I believe that's the way it's pronounced.

Q. The "S.S. Karina"? A. "Karina," yes, sir.

Q. All right. And about what time of the day did this incident occur? A. I'd say approximately 10:30 or a little later.

[21] Q. At night? A. Yes, in the morning

Q. 10:30 A.M.? A. A.M., correct.

Q. Or a little later? A. Or a little later.

Q. As I understand, Mr. Sessions, in the routine course of seeking employment, the thing that you would do would be to go to the union's hiring hall in order to try to get a referral based on your seniority? Is that correct? A. Correct.

Q. And, as I recall, there is a 7:00 o'clock starting time? A. That's correct.

Q. Is that right? And you have to be there, say, an hour ahead of time to try to get a job at the 7:00 o'clock starting time? A. That's right.

Q. Were you there on July 2nd of '69? A. I was.

Q. And did you get a job at the 7:00 o'clock call? A. No, sir, I did not.

Q. And the next starting time is what? A. Was 10:00 o'clock — was 8:00 o'clock.

[22] Q. Was 8:00 o'clock? A. Yes.

Q. Were you present for the — A. I were present at 8:00 o'clock.

Q. And were you able to get a job at the 8:00 o'clock starting time? A. No, sir, I did not.

Q. Now, then, the next starting time would be 10:00 A.M.? A. That's correct.

Q. And was it at that hiring time, for the 10:00 A.M. starting time, that you got this job? A. Yes, sir, that's correct.

Q. What was your gang foreman's name? A. Tom Hocker.

Q. Tom Hocker? A. Yes.

Q. What was your walking foreman's name? A. Van Johnson, Jr.

Q. Do you recall the approximate size of the gang? A. Seventeen men.

Q. Do you recall the kind of cargo that was being handled with reference to whether or not it was considered general cargo or some other kind of cargo? [23] A. Well, at the time, it were considered junk cargo, as far as I know of. Junk cargo.

Q. Among the foremen who is it that makes the specific work assignments? A. The walking foreman relays the message to the gang foreman.

Q. And then the gang foreman — A. The gang foreman relays the message to the workmen, to the mens.

Q. On this particular occasion, on July 2nd, 1969, on what part of the ship were you assigned? A. The forward end on No. 2 Hatch. No. 2 Hatch of the ship, we was assigned to.

Q. Forward end? A. Yes, sir. The forward end of No. 2 Hatch.

Q. Of the No. 2 Hatch? A. Yes, sir.

Q. All right. Now, let's go back. I was intending to inquire whether or not, on July 2nd, '69, you were assigned a job as a winchman or a forklift operator, or just what job did you have? A. I had a hold job, just throwing the cargo.

Q. What do you mean when you say you had a hold job?

A. I was throwing the cargo down in the hold, just unloading it off on pallets so they come in the [24] hold.

Q. In other words, you were performing your work in the hold of the ship? A. In the hold of the ship, correct.

Q. And what was the name of the stevedore that you were working for? A. Midgulf Stevedore Company.

Q. I am certain, of course, that you worked for [25] Midgulf Stevedores on many occasions? A. I have.

Q. Had you worked under Mr. Tom Hocker, the gang foreman, prior to this day? A. Yes, sir, I had.

Q. Had you worked under Mr. Van Johnson, Jr., the walking foreman? A. I had.

Q. With respect to the men in the hold of the ship, did you have a working buddy? A. A working buddy?

Q. A working partner. A. Oh, yes, sir.

Q. A working buddy? A. Yes, sir, I had.

Q. And what was his name? A. His name was Guy Thomas.

Q. When you went to this job on July 2nd, 1969, and even before you went to the ship, did you know what kind of cargo was going to be charged or loaded? A. No, sir, I did not.

Q. When you reported at shipside at 10:00 A.M. on July 2nd, 1969, did the gang go on board the ship? [26]
A. Yes, sir, they went aboard the ship.

Q. And then you were assigned a particular hatch?
A. That's correct.

Q. As I understand, Mr. Sessions, records are kept not by members of Local 872, but records are kept by time-keepers, clerks and checkers, are they not? A. Yes, sir, they is.

Q. And those records indicate the time that you commenced work and the time that you stop work? A. That's correct.

Q. And those records also indicate the name of the vessel you were working on and the hatch that you were working in? A. That's correct.

Q. When you say you were working in the No. 2 Hatch, whatever the records show about the hatch you were in would be accurate, would it not? A. That's correct. Whatever the records show, that's what I was in.

Q. Whatever hatch you were working in. It's your testimony you were working in the forward end of the hatch? A. In the forward end of the hatch.

Q. Is that correct? [27] A. That's correct.

Q. Now, when you say the forward end of the hatch, do you mean by that the bow of the ship, toward the bow of the ship, or toward the stern? A. Well, I mean up toward the stern of the ship. That's the first to the hatch. It's like you step off in the hatch and the hatch is numbered from number 1 and 2, which right at the end of this step, that's the forward end of it.

Q. In other words, you were right at the forward end — A. Yes.

Q. — of the ship? A. That's correct.

Q. When you got down in that hatch, what did you find? Was it empty or was there cargo in there? A. It was empty. The forward end was empty and the after end of the ship was stowed with crates.

Q. All right. Was this after end — are you talking about the after end of the hatch you were working in? A. The after end of the hatch we was working in.

Q. All right. A. See, the — I'd say about half of the hatch, or [28] probably a little more, was took up with

crates already stowed into the hatch and then the — actually, what I'm calling the after end of it.

Q. All right. Now, the time sheet, as best I can determine, shows that you were working in Hatch No. 1.

A. Uh-hum.

Q. Now, let's assume that you were working in Hatch No. 1. You start at the front of the ship. Do the hatches number 1 through 5 to the back of it, or how do you start numbering? A. Well, starting at No. 1, it starts at the forward end. Whichever end you decide to load is the end you decide to put the cargo in.

Q. I am talking about now, Mr. Sessions, when you refer to hatch as Hatch No. 1, do they regularly number Hatch No. 1 as the first hatch at the beginning of the ship or at the tail end of the ship? A. The first hatch at the beginning of the ship is considered No. 1 hatch.

Q. All right, Now, approximately — just in order that I can visualize it — approximately what area, what width and what length was covered [29] by Hatch No. 1? A. You mean by footage? You want me to give it by footage?

Q. Yes, sir. How many feet wide and how many feet long? A. It probably was between forty — about forty foot, I guess, wide.

Q. All right. A. And might have been about forty-five long.

Q. Now, of course, you didn't measure it, did you? A. No, sir. I'm just guessing at it.

Q. And were there any decks between the top deck and the bottom of the ship in Hatch No. 1 where you were working? A. Any — ?

Q. No, no. I didn't make myself very clear. On the "Karina" there was a top deck, wasn't there? A. No, sir. It's just one hold. There was just one deck on the ship.

Q. All right. And that was the deck at the top level of the ship, wasn't it? A. The lower hold of the ship.

Q. All right. A. The lower hold of the ship was considered the whole hatch of it, of No. 1 Hatch, if I'm understanding [30] you correct.

Q. When you went on board the ship did you go there by means of a gangplank. A. Yes, sir, by means of a gangplank.

Q. When you stepped off the gangplank what did you step onto? A. The deck of the ship.

Q. You stepped off on the deck of the ship? A. That's correct.

Q. All right. Now, were there any decks from that deck of the ship that you step off onto down to the bottom of the hold of the ship? Were there any other decks? A. No, sir.

Q. A tween deck or anything of that kind? A. No, sir, there weren't any other deck other than that.

Q. Now, when you stepped off on the deck of the ship you walked on that deck to the No. 1 Hatch? A. Walked to the ladder, to a ladder of the ship, and went down the ladder to the lower hold of the ship, the No. 1 ship — or No. 1 Hatch.

Q. All right. And you went from the deck down to the lower hold by means of a ladder? A. That's correct.

[31] Q. Was this ladder located inside the hatch coaming? A. It was on the end of the hatch.

Q. All right. A. On the end of it, and it was on the end of it between number — if it was No. 1 Hatch, it was between No. 1 and No. 2.

Q. And it would be on the after end of the No. 1 Hatch? A. It was on the after end — the ladder was on the after end of the hatch.

Q. All right. A. In other words, when you step down off'n the ladder, you step down right on top of the crates.

Q. All right. When you climbed or let yourself down the ladder to the lower hold of the ship, was any portion of Hatch No. 1 loaded with cargo? A. Yes, sir, the lower hold.

Q. Which portion of Hatch No. 1 was loaded with cargo? A. The lower hold.

Q. Was it the entire lower hold, the forward end or the after end? A. Just half of the hatch of the lower hold was loaded. Half of the hatch, I'd say, it was loaded with cargo.

[32] Q. And what did it appear to be loaded with? A. Some type of crated cargo. I do not know what was in it.

Q. Were the crates of one tier or were there several tiers? A. It was several keys across, across the hatch.

Q. Several keys? A. Yes, sir.

Q. All right. A. It was several keys.

Q. We will get into that in just a minute. I want to just hand you a photograph which I have just seen today and I want to ask you if that appears to be the way and the manner in which the crated cargo appeared? A. No, sir. That's not even the crate.

Q. All right. Let me show you, then, another photograph.

MR. HARMON: Could the record show the number on the back of that photograph, please? It is number —

MR. BROCK: 11.

MR. HARMON: No. 11.

THE COURT: All right. No. 11 was the one that didn't —

[33] MR. BROCK: That he said did not appear —

THE COURT: — did not appear to look like the crates at the time of the accident.

Q. (By Mr. Brock) Now, Counsel, Mr. Frank Harmon, who is representing Cooper, has been kind enough to show me these pictures and I am now handing you a picture that has been marked 1 on the back side.

Does that appear to be the kind of crated cargo — A. It doesn't seem like it was the kind. It didn't have these bands on it.

Q. It did not have the bands on it? A. No, sir.

Q. All right. I am going to hand you all of the rest of the photographs that Mr. Harmon has handed me, and I want to ask you just to sort through those photographs. Look at each one of them and tell me if any of these appear to be the same kind of crates that were already in the ship, and if they are, fine, and if they are not, well, just tell us. A. One looks more like the crate.

[34] Q. All right. Let's look on the back and be sure. Now, that has 10 on the back of it, doesn't it? A. Yes, sir.

Q. And that appears to be more like the crate involved? A. Yes.

Q. Is that correct, sir? A. That's correct.

THE COURT: When you're talking about crates involved, are you talking about the crates that they were loading on the deck or the crates that were on the deck?

THE WITNESS: The crates that were —

THE COURT: On the deck on which he was standing? Is that what you're talking about?

MR. BROCK: Right, correct, where he was working.

THE COURT: On the floor —

MR. BROCK — of —

THE COURT: — or on the deck, itself, there were crates?

MR. BROCK: On the floor — [35] your Honor, I am going to clarify it.

Let's assume that this semi-square is the floor of the hatch and the bottom of it, and this is the hatch opening with the ladder here on the aft end; that when he crawled down the ladder and got down to this decking representing the bottom or the lower hold of the ship, that there was on the aft end crates of cargo that were already there which he did not participate in loading and which no one else in Houston participated in loading.

And I think Mr. Harmon will agree at this point that whatever crates were in the hold of the ship at Hatch No. 1, they had been loaded there in Mobile, Alabama, by Cooper.

MR. HARMON: On that, as I say, I can't say because we don't know what was here when the ship got here. The facts are the Cooper Stevedoring Company did load certain cargo on this ship in No. 1 and No. 2 and some other hatches, in Mobile, Alabama, and we [36] are in a position to prove the kind of crates that we loaded aboard.

THE COURT: Okay. Let me see No. 10.

Q. (By Mr. Brock) In any event, of the photographs of crates that you examined, the one that has a 10 on the back of it, that I showed you a moment ago, more resembles the crates that were already in, that had been loaded some place else in Hatch No. 1? Is that correct, sir? A. That's correct.

Q. Now, I want you to tell me, by just keeping your witness chair, because I am not going to ask but one or two questions, you tell me where to draw the line with

respect to forward, the aft, the port and the starboard side, as to where the crates were when you went down the ladder to go to work. A. Right in the center there where you got your ladder at.

Q. Right — A. Yes, sir. We call that the after end of No. 1 Hatch — or No. 2 Hatch.

Q. Did the cargo go all the way across to the starboard side? [37] A. All the way across.

Q. Did it go all the way across to the port side? A. Yes, sir, it did.

Q. Now, was there cargo from the point where I have drawn the arrow, started it, cargo all the way from here to here in Hatch No. 1? A. In Hatch No. 1, that's correct.

Q. Now, don't let me — I want to find out what the facts are. A. All right. That's correct.

Q. All right. A. See, now, it was all the way from one —

Q. There was cargo from here — A. That's correct.

Q. —over to here? A. That's correct.

Q. And this was what you would call loaded with crated cargo? A. That's correct.

Q. Was there any cargo on the starboard side of the hatch, the port side of the hatch, forward of this or on the forward end of the hatch floor? A. Not when we arrived there.

Q. This was all ready for some type of cargo? A. Vacant space, yes, sir. All that was vacant space.

[38] Q. All right, sir. Now, I asked a moment ago, and I want to go back to it, and particularly after looking at the crates, assuming this is the floor, were the crates stacked just on the deck flooring or were the crates stacked on top of one another? A. Just on the deck flooring.

Q. So there would be crates like that? A. That's correct.

Q. One tier of crates? A. That's correct. One wing tip to the other wing tip.

Q. All right. A. But, now, when you say one key, it might have been several keys, but it wasn't but one key across, is what I'm speaking of. But as far as the length of it, it could have been four or five keys or more across half of the hatch, consuming the whole hatch, half of the hatch.

Q. Now, Mr. Sessions, you used the term, key, I have noticed, a great deal. A. Yes.

Q. Now, explain to the Court what you're talking about when you refer to a key. A. Well, that means — what we term as the key is [39] like if, say, if you're going to put a sack or a box down here, you just put — as you put one, you put one box, you put two, two, three, and they call that, key. One box high, two box high or three box high. Well, you say one key high or two keys high or three keys high. That's the term we use.

Q. Now, if you just have it one crate high all the way across, that would be one key? A. One key, that's correct.

Q. If you came along and put another crate on top of that — A. It would be two keys high.

Q. Then you would call it two keys? A. That's correct.

Q. Was it one key, two keys, three keys, or four keys high? A. It was just one key high.

Q. That's what I wanted to be sure that I understand, your terminology in the longshoring business.

So far as you know, did you go on board the ship at or about 10:00 A.M. on July 2nd, 1969? A. About 10:00 A.M.

Q. All right. [40] A. We went aboard the ship maybe, say, about — it might have been ten or fifteen minutes prior to 10:00 o'clock, but we didn't start to work

till about 10:00 A.M. We may have arrived at the ship maybe ten or fifteen minutes earlier.

Q. What kind of cargo were you men assigned to load?

A. Bag cargo. Some type of bagging cargo that was in a paper bag.

Q. All right. A. I was told it was some type of corn starch or something.

Q. In other words, you were loading paper bags which you were told was corn starch? A. Yes.

Q. How much did each paper bag weigh? A. Well, I really don't know. I didn't pay attention to the weight, but just to feel of the weight, if I had to make a guess at it, I'd say around eighty pounds up to a hundred. I don't know. I'm just making a guess at it. I didn't look at the exact weight.

Q. When the bagged cargo was hoisted from the dock into Hatch No. 1, was it brought in on a pallet? A. Yes, sir, it was.

Q. How many men in the hold of the ship would unload [41] each pallet? A. Four men on each side. There was eight men, total.

Q. In other words, there would be eight men unloading one pallet? A. No. Four men on one pallet.

Q. And four men on another pallet? A. On another pallet.

Q. As soon as, or within a reasonable time after, you got down to your work area, I assume the winch operator and the flagman and the hook-on men started charging the ship with this bagged cargo? A. Yes, sir, they did.

Q. And I gather that as this cargo was charged, it would be put down into the square of the hatch, put down in here some place? A. That's correct, but it were put in on the forward end of the hatch there.

Q. Put on the forward end of the hatch? A. Yes, sir.

THE COURT: Were you bringing on two pallets at a time or were you unloading two pallets at a time, or what?

[42] THE WITNESS: Yes, sir. We was unloading two pallets at a time, but one would be inshore of the ship and one would be offshore of the ship.

Q. (By Mr. Brock) In other words, you had two winches, an inshore and an offshore winch? Is that correct, sir? A. No. We just had one winch driver. He'd bring us a load, bring the inshore crew a load, and set it down. Then he'd go back and bring the offshore crew, and by the time he got back with the inshore load, well, they'd have our load unloaded.

So, see, that way they kept the loading going, that way.

Q. Which side were you working on? A. I were working inshore.

Q. In other words, that would be on this side? A. Well, that would be on the left side of the ship. That would be the left side.

Q. Is in. All right. If this is the forward end — A. Yes, sir.

Q. — Then that would be the inshore side? A. That is correct.

Q. And in the process of the four of you men discharging [43] the bagged cargo, do you work in pairs? A. Yes, sir, we works in pairs.

Q. And your partner's name was? A. Guy Thomas.

Q. Guy Thomas? A. Thomas.

Q. All right. Now, explain to me whether or not you had unloaded a sufficient number of bags of corn starch to fill this area? A. Yes, sir. We had unloaded a sufficient amount almost to complete that area.

Q. And how high had you gotten with the bagged cargo? A. Bringing it to the height of the crate.

Q. Like this little sketch down here indicating a crate —
A. Yes.

Q. — You had brought the bags of corn starch up to the top — A. Yes.

Q. — Equal to the top of the crates? A. That's correct.

Q. Now, before you put any cargo in this area did you put down any paper to cover the open flooring? [44] A. Yes, sir. We put down some brown paper to cover that flooring on the forward end of the hatch.

Q. After you got the cargo completed at the forward end of the hatch and you had brought it up to the level of the crates, what was the next job that you had to do?

A. Well, the next job we had to do was to put some cargo on in the wing of the ship, bring the wing of the ship out.

Q. All right. Now, just tell me, without moving from the witness chair, where is the wing of the ship? Is this it?

A. No, Sir.

Q. Is this it? A. No, sir. All the way over to your white line.

Q. All the way here? A. That's correct.

Q. And to the other side. That's what is considered the wings of the ship? A. In other words, out this way. That's correct.

Q. That would be the wing? A. That's right.

Q. To get it up even with the crates? A. Well, see, the crates, we just went right on top [45] of the crates with that particular cargo. We just put down some brown paper right on top of the crates and started to stacking that cargo right in the wing, bringing it out to the center of the hatch.

Q. Are you talking about here, now? A. Yes.

Q. All right. Now, I specifically want to ask you —

THE COURT: Do you put the cargo on top of the crates, the bags on top of the crates? Is that what he's saying?

THE WITNESS: Yes.

MR. BROCK: We haven't gotten to that, but this is what they ultimately did.

Q. (By Mr. Brock) You put brown paper on the floor?
A. On the floor, that's correct.

Q. And you did that on the wing of the hatch? A. That's correct.

Q. And then, after putting the brown paper out, you then put the bagged cargo? A. We put the brown paper right in the wing of the ship, started in the wing of the ship. See, we'd left the hatch of th ship open. Didn't, put no [46] paper in the hatch of the ship.

Q. Right here? A. That's correct.

Q. All right. A. We left that part open. We just put our brown paper running along upside of the ship and brought it — brought the work out to the center of the hatch to us.

Q. And when you bring it out to this point here on either side, would that be called the center of the hatch?

A. That would be called the center of the hatch.

Q. All right. So, ultimately, you had the entire floor forward and aft, port wing and starboard wing, where you had the thing fairly level? A. Fairly level.

Q. With bagged cargo and crated cargo? A. That's correct.

Q. Now, after you had the bagged cargo up to the same level as the crated cargo, then what were you getting ready to do? A. Bringing the wing out to the centers, as I stated. At the point when I stepped in this hole, throwing this cargo going to the wing part of his ship, see, I was working inshore.

[47] Q. All right. A. Well, now, while stepping with cargo, coming to the wing of the ship, making a step back-

wards and forward. is when I stepped in the hole of the ship with this cargo in my arm.

Q. All right. A. And so the wing of the ship hadn't been brought out to the center of the hatch at that time. It was still open, but we was bringing it out.

Q. All right. A. In other words, we was bringing to many foot up the wing, then we would come out to the center of the hatch.

Q. Now, in the process — A. And that's the point where —

Q. In the process of completing the inshore wing of that hatch, this is the time when you got hurt? A. That's correct.

Q. And what was it that — where were you walking when you got hurt? A. On the middle of the hatch to the wing of the ship.

Q. What were you walking on top of? A. Crates.

[48] Q. And on top of these crates where you walked and stepped through, was there any kind of covering or paper or anything else like that? A. There was white paper on top of these crates. Looked like corrugated white-looking paper, big, old, white, thick-looking paper was lying on top of these crates.

Q. Was that paper there at the time that you went in the ship to go to work. A. Yes, sir. It was there at the time we went into the ship.

Q. And when you were walking on top of these crates, which leg and which foot was it that went in between the crates? A. My right leg.

Q. Did your right foot and right leg go between crates or did your foot and your weight break through the crates? A. It went between crates.

Q. And when your right foot and leg went between the crates, were you carrying anything? A. A sack. I was carrying a bag of cargo.

Q. Were you carrying it in conjunction with your partner, Mr. Thomas? A. No, sir. I was packing it by myself.

[49] Q. You were carrying that one by yourself? A. Yes, sir.

Q. And how far, with respect to the bottom of your foot to your knee, did your leg go through that hole between the two crates? A. Down to my knees.

Q. Down to your knee? A. Yes.

Q. And in the process of stepping in that hole, carrying this bag of starch, what happened to you? A. Well, in the process of stepping in the hole, as I was about to swing and throw the bag at the same time, it swung and pulled my back.

Q. When you went down into Hatch No. 1 did you notice then, or did you notice after your foot went through, that the crated cargo had not been secured? A. Yes, sir. We noticed it right away when I got into the ship.

Q. In other words, when you went into the hatch you saw at that time that this crated cargo in the aft end of this hatch had not been secured? A. Yes, sir.

. . .

[51] (By Mr. Brock) Mr. Sessions, have you, since 1957, ever worked crated cargo? A. Yes, sir, I have.

Q. And have you worked crated cargo on few occasions, several occasions or many occasions? A. On many occasions?

Q. Is a lot of the cargo that goes through the Port of Houston crated cargo? A. Yes, sir.

Q. Have you observed in those instances that cargo, crated cargo, is secured? A. Yes, sir, I have noticed it's secured.

Q. On the occasions that you have noticed or observed it, was the crated cargo secured? A. Well, in many cases it is secured—I notice it being secured by banding gear.

Q. Banding gear. All right, sir. A. I've also noticed it being secured by dunnage [52] or timber. I've noticed it being secured by timber.

Q. All right, sir. A. And I also have noticed it being secured by chain gear and cables.

Q. All right. A. I have noticed it being secured with cables.

Q. All right. Now, let me take each one of those. Was there any dunnage securing this crated cargo? A. No, sir, it was not.

Q. So far as you know, were there — A. No, sir, it was not.

Q. — Banding gears, securing this cargo? A. No, sir.

Q. And were there any chains being used to secure the cargo? A. No, sir, it was not.

Q. Any cables used to secure the cargo? A. No, sir, it was not.

Q. Now, Mr. Sessions, I want to ask you, also, have you worked in connection with crated cargo? A. Yes, sir, I have worked with crated cargo.

Q. Where it was not secured? A. Yes, sir. I have worked where it wasn't secured.

Q. In other words, there have been occasions when it [53] came through that it wasn't secured? A. That's correct.

Q. All right. To whom did you report the fact that you had stepped through this space between the crates? A. The walking foreman, Van Johnson, Jr.

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[83] Q. (By Mr. Brock) Did anybody other than yourself witness your stepping through this, between these crates, to your knowledge? A. Yes, sir.

Q. Who witnessed it? [84] A. Thomas.

Q. That's your working buddy, Guy Thomas? A. Yes, sir.

Q. Anyone else? A. Well, the other two men that was working with me, they saw it.

Q. Do you know what their names are? A. I didn't know them by name, but I only knew them by face. But now I know them by names.

Q. All right. A. One of them was named Grant. J. Grant, Jr., I believe is his name.

Q. All right. And the other one? A. And they had one named Jefferson.

Q. Was the gang foreman down in the hatch where you men were working at the time? A. Not at the time we was working.

Q. Was the walking foreman in the hatch at the time? A. No, sir, he was not.

Q. Can you tell me on this occasion when you went to work on the "Karina" whether or not the walking foreman or the superintendent had been into the hatch where this work was to be performed? A. If they had, I didn't see them.

Q. In other words, you have no knowledge? [85] A. No knowledge of it.

Q. Is it routine or is it customary for a stevedore's representative to go into the hatches where the Longshoremen are to work to see what the working conditions are?

A. Well, it's their custom to do that, but —

Q. Normally — A. Normally, it's our custom to do that and most times —

Q. Who normally does that for the stevedore, if you know? A. The walking foreman mostly go down and make a report to the superintendent. Sometimes we has two walking foremen. You go down and make a report to the other walking foreman, what kind of space he got down in the hatch, and all of that.

Q. Now, with respect to the two walking foremen, as I understand it, you would have a black walking foreman

who would be working over in your end of the ship? Is that correct? A. That's correct.

Q. And if white longshoremen were working the other end of the ship, there would be a white walking foreman? A. That's correct.

[86] Q. Well, what period of — strike that.

MR. BROCK: Your Honor, I believe that's all I can think of now. I'm sure I've forgotten something, but I'd have to come back.

THE COURT: All right. Mr. Smith.

CROSS EXAMINATION

By Mr. Smith:

. . .

[92] As I understand your testimony, you went down the ladder that morning and walked across the crates to the forward end of the hatch when you first went in? A. Yes, sir, that's right.

Q. And your gang proceeded to load these paper bags in the forward end of the hatch until you got up to even with the crates that were already there? A. To the after end of the hatch.

[93] Q. Well, up to where — A. You said the forward end.

Q. — up to where the crates were located. A. We started where the crates wasn't loaded on the floor, where the crates was not loaded.

Q. Up here and moved back? The crates were back here? A. Yes.

Q. Isn't that what you testified? A. We started up there and moved down, down to the crates.

Q. All right. Did you have any trouble, when you walked across the crates, going to the forward end of the hatch

when you first went down there? A. Have any trouble?

Q. I mean — yes. Did you step in any hole? A. No, I stepped in no hole.

Q. Did the crates look level and up next to each other like they should be? A. Well, they — to my knowledge, they did.

Q. When you first went in there that morning, the crates that were already there, did it look like a good, tight level stow? A. It looked like it was, but once you could look the crates over, there were cracks in them. In [94] some of the crates there were cracks in them.

Q. Just where the crates were up next to each other? A. They was up as tight as they could be at the time. Looked like they had shifted or either wasn't stowed real tight, one.

Q. All right. But did you make any complaints? Did you make any complaints to the gang foreman or the walking foreman about there being any problems with the way the crates were stowed when the gang first went in there? A. No, sir.

Q. All right. It's not unusual to see cracks between crates like this in this type of stow, is it? A. Well, no, sir. It's not unusual to see a crack.

Q. It's just sometimes physically impossible to get one crate to fit exactly snug up against the next one? A. Sometimes it is.

Q. But you weren't concerned when you first went down there about there being any hazardous condition about the way these crates were stacked, were you? A. No, sir.

Q. You had plenty of light to see, didn't you? A. Yes, sir.

[95] Q. All right. Now, I gather everything was going smoothly up until the time you stepped in this hole? A. Yes.

Q. You had no problems up to that time? A. That's correct.

Q. And if I understand your testimony, you were carrying a sack, walking across the top of the crates, going back into the wing, when you stepped on a piece of paper? A. Yes, sir, when I stepped on a piece of paper.

Q. Now, this piece of paper, as I understand it, was covering the hole that your foot went down into? A. That's correct.

Q. You didn't see the hole there before you stepped on it, did you? A. No, sir.

Q. All right. Is the reason you didn't see it was because it was covered by this piece of paper? A. That's correct.

Q. All right. As I understand your testimony, this piece of paper was already there on top of the cargo when you went to work that morning? A. To my knowledge, it was.

Q. Was it a separate texture and kind of paper than [96] the separation paper that you testified that the men put down? A. Yes, sir. This paper was white. We was putting down brown paper.

Q. Did you call this butcher paper on your deposition? A. No. The lawyer who was having the deposition called it butcher paper.

Q. But it was a different kind of paper? A. Yes, sir. It was a different type of paper. I told him it was corrugated paper.

Q. But there's no doubt in your mind that no member of your longshore gang put that piece of paper over the hole?

MR. HARMON: Your Honor, I'll object to that. I don't think he can know whether some other member of the gang put it there.

THE COURT: Well, I don't know whether he knows or not. Go ahead. I'll overrule that objection.

Did he answer the question?

Q. (By Mr. Smith) Did you understand the question?

A. No, sir, I didn't quite get your question. Will you rephrase it?

[97] Q. Well, you testified that Houston longshoremen were putting down some brown paper. A. That's correct.

Q. And the paper that you stepped on was white? A. That's correct.

Q. Did you see any of the other Houston longshoremen that morning that were working in the hold with you bring in a piece of paper like this and put it over on top of the boxes where you stepped in this hole? A. No, sir, I didn't see no more.

Q. All right, sir. Did it appear to you that this piece of paper was on top of the boxes when you went in the hold?

A. Yes, sir. It was on top of the boxes when I went in the hold.

Q. All right. As I understand it, the only reason you didn't see this hole, this space between the crates, was because this paper covered it up? A. That's correct.

Q. And as I understand, you had no indication or you had no reason to think that there was a hole under there?

A. No, sir, I did not.

Q. Did the cargo or the crates' general appearance [98] look safe and satisfactory? A. Yes, sir.

Q. And you didn't make any complaints about the condition of the crates that morning before you stepped in there, did you? A. No, sir.

Q. And neither did any of the other longshoremen that were working with you, did they? A. Not to my knowledge.

Q. As a general practice, do the longshoremen put down separation paper or do seamen? Just generally. A. Longshoremen, just generally.

. . .

[102] Q. What was the name of the gang foreman again?

A. Van — Tom Hocker.

Q. Hocker? A. Yes.

Q. He's a double gold star plus, isn't he? A. I don't know about all the plus, but he's a double gold star.

[103] Q. Well, he's been down there about fifty years, has he not? A. Yes. He's been down there quite awhile. I don't know how long exactly, but he's been down there quite awhile.

Q. Would you say he is an experienced gang foreman? A. Yes, sir, he is.

Q. You have worked with him on many other occasions? A. I have.

Q. Do you know whether or not that Mr. Hocker came in and looked in the hatch that morning when you all started to work to see if everything was all right? A. Yes, sir, he did.

Q. All right. He's a gang foreman. That's part of his job? A. That's correct.

Q. And he did come down and look? A. He came to the hatch and looked.

Q. All right. Nobody complained about any problems? A. No, nobody complained about any problems.

Q. Because they didn't see any problems to complain about, did they? A. I don't say they didn't see them, but at the time we was working in the after end of the ship there [104] wasn't any problems to see.

Q. But there is no doubt in your mind that Mr. Hocker is a capable, experienced gang foreman that you have worked for on many occasions in the past? A. Yes, sir.

Q. Have you worked for him since this accident? A. Yes, sir.

Q. Would the same go for the walking foreman, Mr. Van Johnson, Jr.? A. Yes, sir.

Q. And you're not telling Judge Singleton, are you, that it's a walking foreman's job to go down and inspect every hatch before the longshoremen go in, are you? A. No. I didn't say it was the walking foreman's job.

Q. All right. Now, they showed you a bunch of pictures of different kinds of crates and you picked out one picture that looked kind of like the crate in question.

My question is, did all the crates that you saw down there the day you got hurt look to be about the same? A. Yes, sir. They looked to be about the same. They was all about uniform crates. It looked to be [105] uniform at that time.

Q. Yes. A. It might have been some a little lower, a little higher. I didn't take a measure, you know, and measure them to see, but they looked to be.

Q. So there wasn't some little bitty ones and some great big ones. They were all about the same size and looked about the same? A. They looked to be.

MR. SMITH: I pass the witness, your Honor.

THE COURT: All right, Mr. Smith. Mr. Harmon.

CROSS EXAMINATION

By Mr. Harmon:

Q. Mr. Sessions, from your experience on the waterfront, you have generally observed, haven't you, that when you are in a gang that goes to work in a hatch, that ordinarily your gang foreman will look down in the hatch to see what the working conditions are before he sends the gang down there, isn't that right? A. That's correct.

Q. Because the longshore rules make it the responsibility [106] of the gang foreman to check over working conditions and be sure that the crew and work were safe; otherwise, he's not supposed to send them down there, is that right? A. Well, I don't say he's not supposed to send

them down there, but I say usually his duties is to check to see that things is in order. They usually spot check it and see.

Q. All right. Now, these crates, did you happen to notice that these crates were actually palletized cargo; that is, that there were pallet boards underneath the crates? A. No, there wasn't no pallet boards underneath. You speaking about what a fingerlift might be able —

Q. Yes. Right. A. No, sir. It was not that type.

Q. It was not that type? A. No, sir.

Q. In all fairness to you, Mr. Sessions, we've got a number of records here from the company who shipped them which indicates that they were palletized and that's the reason I asked you the question. A. They was not. I'm sorry to tell you, but they was [107] not palletized.

Q. So you're positive that the type of crates that were in there, which you were walking across the top of, were not palletized cargo? A. I'm positive of that.

Q. Are you equally positive, Mr. Sessions, that the type of crate that you were on — incidentally, you can tell that these crates that I'll show you here, that are marked on the back here as No. 5, you can tell that that is a palletized crate, can you not? You see the pallet boards underneath there? A. Yes, sir, I see it under.

Q. You can see the pallet boards underneath the one that's marked No. 3? A. Yes, sir.

Q. Can you also see them underneath what's marked No. 1?

THE COURT: I can't hear you, Mr. Sessions.

A. I say, this one is mighty flat. You can't tell too much about whether its got skids on it or not.

Q. (By Mr. Harmon) All right. Now, what about this one, marked No. 6? Can you see the fact that it's [108] got skids under it? A. Yes, it's got skids under it.

Q. All right, sir. Now, Mr. Sessions, these photographs here, which are marked 1 and 6 and 3 and 5, you notice that each one of these has got this corrugated brown — in other words, that's brown corrugated cardboard paper on top of that, is it not? A. That's what it looks like. I can't really tell.

Q. All right. Now, as I understand it, your crew and you, yourself, did go and lay separation paper on the deck of the open part of the deck of the vessel before you put the bags — grits, or whatever it was that was in the bags that you were loading? A. On the floor.

Q. On the floor of the ship? A. That's correct.

Q. Now, after you had floored off the deck of a vessel and got it up to about even with the height of the crates, did you all start laying some separation paper on top of the crates before you started putting the bags of cargo on them? A. No, sir. We started unloading the bags on the floor, flooring them off, putting them down, [109] the bags on top of bags, just flooring them off.

Q. Well, no. You may not understand my question. I'm saying, before your accident happened you did get around to start to put some bags on top of the crates, did you not?

A. No, sir, not before we started to putting cargo in this end up here where the crates is not in. You see, up here where the open hatch is, well, there's no crates there. That's where we didn't put no paper.

Q. All right. A. We put a paper up there where there was nothing but a wooden floor.

Q. (Indicating)? A. No, down here to it. In that area. That's right.

Q. Now, is this area down here, this is where the crates were, wasn't it? A. The crates is up there where you see that —

Q. Well, I think perhaps you've become confused or maybe I didn't understand you. A. Where your crates

is is up there where the center of the little dotted mark is.

Q. Here? A. Yes, sir. That's where we put the paper down there. Now, that's the forward end of the ship, [110] and then the after end of the ship is where the crates were.

Q. All right. That's here all the way out to the sides of the ship? A. That's correct.

Q. The crates went all the way across, as I understand it? A. That's right.

Q. All right. Now, isn't it correct that at some time before your accident happened you and some of the other men in your gang had gone and laid some pipe on top of some of the crates before you started loading bags there?

A. No, sir.

Q. Well, now, Mr. Sessions, of course, I was not present when your deposition was given, but do you remember that you gave a deposition where there was a court reporter present like this young lady? A. Yes, sir.

Q. And the lawyers who represented the steamship company — A. Yes, sir.

Q. — in Mr. Williams' office asked you some questions? [111] A. Yes, sir.

Q. This was back in, I think, April of 1970. And you were asked some questions by a lawyer named Schill. A. Yes, sir.

Q. And this was on page 36 of your deposition. Have you had a chance to read this deposition over, incidentally, Mr. Sessions, before you came here? A. I glanced over it.

Q. All right. Well, in your deposition, Mr. Sessions, on page 36, you were asked some questions and one specifically that was asked of you, the question was this:

"And then when you got to the top of the crates, that is when you put the paper over the crates? Is that right? And you answered "Yes, that's correct."

Then you were asked the question, and this is on top of

page 37, "And the people who put the paper over the crates were the longshoremen? Is that right?"

And you answered, "That's correct."

Then, "Question: and did you help put the paper over the crates?"

And you answered, "Yes, sir, I did."

[112] A. I'm still telling you, when we got up to the height of the crates, we did put paper over there.

Q. Okay. A. You asked me did we put paper when we went to there to put the paper on the floor.

Q. No, no. I'm sorry. Maybe I asked you the wrong question.

My question is, after you got your sacks of cargo on up to the height of the crates — A. That's correct.

Q. — then you would go and lay some paper over the crates before putting bags down on top of the crates? A. That's correct.

Q. And you, yourself, and the other men in your gang, had laid some separation paper on top of the crates and after you put the paper on top of some of the crates, you then put a bag or bags, and when you got ready for the next row you put more paper and more bags, right? A. Yes, sir, only in the wing, though.

Q. In the wing? A. In the wing, each one of your wings.

Q. Because at the time your accident happened, you hadn't gotten back to this part to load sacks [113] on it, had you? You always start loading from the wings inward, don't you? A. We had started in the wings and was coming out, but we had loaded up to that point.

Q. I understand. But my point is you had loaded all this except that even to the crates? A. That's right.

Q. Then you would lay paper first back here in the

wings and then lay sacks back in here. Then you might lay another strip of paper and then lay sacks in there in the wing? A. Yes, sir. Could I straighten you up a little bit?

Q. Go right ahead. A. When we working in spaces like this, we always leave quite a bit of room there in the hatch before we start laying paper, sacks, back in the wing.

Q. Right. A. And, naturally, some men can work out there still in this area. I want that to be understood.

Q. I understand. You've got to keep this area open so that the pallet bags can be laid? A. We still haven't got it up to the height of the crates, you understand. Still plenty of room [114] that you can work in that area though we was working in each wing of the vacant spaces up there where the crates is.

Q. Now, before your accident happened, you had laid some paper on top of the crates and had loaded some sacks on top of the paper on top of the crates? A. That's right.

Q. All right. Now, the separation paper that you were using and laying, Mr. Sessions, was it white paper? A. It was brown paper, separation paper. It was brown paper.

Q. Brown paper? A. Yes, sir.

Q. All right. Now, you say that this piece of paper that you stepped on, or when you stepped on it, did your foot go through the paper? A. It tore through the paper.

Q. All right. And that was a piece of white paper? A. White-looking paper.

Q. All right. It wasn't like any kind of brown corrugated paper that you see in these pictures here in front of you? It's not that kind of brown corrugated cardboard paper? [115] A. Well, now, you see, I can't tell too much about it—

THE COURT: Let me see those pictures.

A. —about how white this paper is, whether it's brown or white, but it was whitest-looking paper.

Q. (By Mr. Harmon) Well, here is what I am talking about in the photographs here. You see, this is a corrugated cardboard, you might call it corrugated paper or cardboard, that's on top of this crate that you see in picture No. 6. You can see the same color of cardboard here on top of this picture No. 3. You see what I'm talking about here?

A. Yes.

Q. And you see the same thing, there's the same kind of corrugated brown cardboard paper on top — A. It didn't look to be that type of paper. A. It didn't look to be that type. I wouldn't say it wasn't, but it didn't look that type. This was just old, old, slick-looking, white-looking paper.

Q. Well, now, was it corrugated? A. It looked to be corrugated.

[116] Q. Corrugated paper? A. Yes, sir.

Q. And about how big was it? Was it as big as that green blackboard over there? A. Oh, yes. Larger than that.

Q. Well, was it — A. Wider than that.

Q. What? A. It was wider than that.

Q. Was it as big as this big blackboard here? A. Something about like that.

Q. About this size? A. Oh, it might not have been quite as wide, but about.

Q. Well, this blackboard, I'm guessing, is about four foot by about five foot, maybe. A. Well, it might not have been quite that, four foot, but it was about that wide.

Q. Was it a rectangular — was it a regular-shaped piece of paper or did it have jagged edges on it? A. No. It was just a regular piece of paper.

Q. Well, my point is, did it have square corners to it and flat sides or did it look like it had been torn and torn off of another piece? [117] A. It looked like an ordinary piece of paper that had been torn off other pieces, to

me. I didn't examine it real good to actually tell you the truth about it to tell whether it was four corners or three corners. I know it was just white, long-looking paper, corrugated-looking paper.

Q. All right. And it was the only piece of paper like that that was on top of any of the crates? A. The crates where I stepped. Now, there was — the other paper was down in the ship, other — that same type of paper was on across in the wing of the other — in the same hatch, but it was in the wing, you know, on top of the crates over there, too.

Q. Well, this wasn't separation paper, was it? A. It could have been. Like I say, I don't know what kind of paper it was. It was there when we went there.

Q. Now, the great majority of the crates that were down there, though, were not covered by this kind of paper, isn't that true? A. Well, I'd say the majority of them wasn't.

Q. Now, in most places, therefore, could you see, [118] as you would walk along on top of the crates, could you see where the crates came up together? A. Against the other crate?

Q. Yes. A. Yes, you could see.

Q. I mean, you could see that separation between the crack that represents where one crate comes up against another? A. That, you could see that.

Q. All right. And as you walked up toward where this piece of paper was with this sack you were carrying, did you see the piece of paper up in front of you? A. No, because, you see, when you be working, you don't be just looking and watching, you know, trying to see. You be working so fast trying to get unloaded the pallet where you can be ready for the next cargo when it come in, and that's what we was doing.

Q. Now, was this white paper that was laying around down here scattered in different areas over the crates? Was that the way it was, kind of one piece here and maybe another piece there and another piece there? A. That particular piece I stepped on was one piece [119] across there. But, now, there were other pieces scattered, too, on other crates, but not the crate where I was — you know, in the area where I was working. I'd say in the offshore it had some white paper like that, too, on top of the crates.

Q. All right. Was this paper laying perfectly flat or was it in some places ruffled up or crinkled? A. It all looked flat to me.

Q. Was the paper the type anybody who looked down in the hatch could look down in the crates and see that there was different white pieces of paper lying there? A. It was more or less right in the wing of the ship, like, and coming out from the wing, right at the coaming and going back toward the wing.

Q. Certainly anybody who goes down the hatch and looks over the top of these crates can see that there are pieces of paper in various places, can't they? A. If they were looking for paper, they should.

Q. When you went on the ship that morning, did you all have to uncover the hatch at the main deck level? A. Yes, sir, we uncovered it. We rigged the ship.

[120] Q. As I understand it, you don't recall there being any tween dock hatch opening? A. No, it wasn't no tween deck.

Q. Well, now, here again, Mr. Sessions, in all fairness to you, we've got some plans that the steamship company's lawyers have given us of the ship, which indicates that there was a tween deck on the ship. You know what a tween deck is, do you not? A. Sure, I know what a tween deck is.

Q. All right. Do you think it's possible that there might have been a tween deck area in this ship and that the rea-

son you don't remember it is that you all didn't have to take any hatch boards off the tween deck area? A. No. We went right down the ladder, right on top of the cargo. We didn't go no more than eight or ten feet at the most before we was on top of the other crated-up cargo. If there had been a tween deck, that would have been the tween deck, but that was the lower hold and it was an old-time ship with a wooden bottom in it. You very seldom see those.

Q. Well, let me show you what the lawyers for the steamship company have submitted and said that [121] this is the cargo plan of this vessel. And you see, here it shows it's the "S. S. Karina" and shows that it loaded in Mobile and then New Orleans and then Houston. And you see on this—this plan does show that it's got a tween deck area.

A. What hatch?

Q. In No. 1.

MR. SMITH: You can't tell that.

A. Well, I've never seen a tween deck with a wooden bottom in it, have you?

Q. (By Mr. Harmon) No, I haven't, but all I'm saying is that this plan here shows that there is a tween deck area here in the No. 1 hatch as well as the other hatches in the vessel, and I am just saying that may be the reason that you do not remember is because the hatch opening in the tween deck was open and therefore when you went down you just, you know, you just forgot it was there. A. I don't think I forgot it. Maybe I did, but I don't think I did. This ship was an old, wooden vessel, because we all spoke about putting dunnage on top of wooden floors. Very, very seldom they'll ever put dunnage on top of a wooden floor.

Q. When you say the dunnage you were putting down, [122] you just mean the separation paper? A. Dunnage is wood. Dunnage is wood.

Q. All right. Did you all put wood dunnage down? A.

Yes, sir. We put wood dunnage down on top of the floor when we first started to work, not on top of the crate. On top of the wooden floor. Then we put down paper on top of the dunnage, and that's why I'm telling you, this was a wooden floor. It had been washed down. Somebody had washed it down from some port or another.

Q. Now, your gang went to work at 10:00 o'clock that morning? A. Yes, sir.

Q. Do you know whether or not some other gang had worked that ship before your gang started working it that morning? A. It may have. I don't know.

Q. What? A. It might have another gang worked it because that particular gang — he carried a gang for somebody. It wasn't Tom's original gang. He was assigned to that gang.

Q. Now, did I understand you to say earlier that you could tell, when you first saw these crates, that they were not banded or chocked or secured [123] in any way? A. Yes, sir. You heard me say that when I saw them and we got down in the ship and I looked at them I could tell that they weren't secured by looking at them.

Q. All right. And you said that you had experience in working with crates and you have seen occasions both where they have been banded or chocked or secured by dunnage or some other means and you have had occasion to see them when they're not secured? Is that correct, sir?

A. That's right.

Q. And you don't know who it is that makes this decision about whether they are going to band them or chock them or secure them in some other means? As to who makes that decision, you don't know who does it, do you? A. No, sir, I don't know who does that.

Q. All right. Now, Mr. Sessions, is it correct, sir, that at a time in the past, at least that you remembered in

talking to some of the people that you talked to right after the accident happened, that you remembered telling them that you were working on crates of brick? A. On bricks? [124] Q. Yes, on crates of brick? A. No, sir, I don't recall telling no one I was working on crates of brick. I remember someone telling me that they thought it was bricks in the crate.

Q. Mr. Sessions, did anybody in your gang ever suggest to you all that you all try to pick up any of this paper that was laying around there on top of these crates? A. I didn't hear.

Q. Sir? A. I didn't hear 'em.

Q. All right. A. If they did.

Q. You have had occasion, I'm sure, when you've got into a hold and you have found that somebody has left some trash laying around that may constitute a hazard to you in walking around where you have been told by your gang foreman to go in here and clean up this trash before you start working so that you could see where you're walking? A. Yes, sir.

Q. You have had that experience, have you not, sir? A. I've had that experience.

[125] Q. All right. Now, from the way this paper was scattered, it was obviously just scattered at random, was it not? I mean, there was no plan or system to the way the paper was laying there? A. It looked like it could have been used by separation or something of that nature.

Q. Oh, you think that maybe somebody had tried to put some separation paper on top of these crates? A. Well, I wouldn't say yes, but I'd say that's what it looks like.

Q. I see. And, of course, you don't know who put the separation — who might have put the paper there, do you? That you don't know, do you? A. No, sir, I do not.

MR. HARMON: All right. I believe that's all.

REDIRECT EXAMINATION

By Mr. Brock:

Q. Mr. Sessions, what kind of paper were you furnished for separation paper? A. Brown-looking paper.

Q. What kind of paper were you furnished to put on top of the wooden dunnage? A. Brown-looking paper.

[126] Q. And this was not brown paper? A. No, sir. You're speaking of — you said "this." You mean the brown paper what was on top of the wood?

Q. What color was the paper that you stepped on and your foot went through a concealed hole? A. That was white-looking paper.

Q. White paper? A. Yes, sir.

Q. Did it appear to be thicker or thinner? A. Yes, sir. It appeared to be much thicker than the paper we was putting down.

Q. It certainly was not the kind of separation paper that you people were using? A. No, sir.

Q. It was thicker than what you normally find with separation paper? A. Yes, sir, it was thicker.

Q. Do you know whether or not the ship's crew is the one that makes the decision to secure the crated cargo? A. No, sir. The only thing I know about the securing is the foreman tells us when, you know, we got to secure it.

Q. All right. You don't know who makes the decision — [127] A. No.

Q. — As to whether or not this particular cargo will be crated — A. No, sir.

Q. — or would be secured? A. I do not know who makes that decision.

Q. And what is the reason, if you know, for securing the cargo? A. Well the reason for securing it is keeping it from shifting from one side to the other one.

Q. And in the process of shifting what happens? A. Well, you could lift your ship or either you could damage your cargo.

Q. And can you get spaces in between them? A. Can I get which, now?

Q. And can you get spaces in between them? A. Yes, sir. It will work spaces in between. Any time anything shifts around, spaces will work in between them.

Q. I don't know that it is really material in the case, but Mr. Harmon was questioning you about whether or not there was a tween deck and you say you just absolutely have no recollection of a tween deck? A. That's correct. [128] Q. At one point in your deposition, and Mr. Harmon read from page 36 where you said you put paper over the crates. That was this separation paper, the brown paper you're talking about, is that right? A. That's right.

Q. And in another place in your deposition, when you were asked if you put the paper down over the crates, on page 35, your answer was, "No, sir."

Did you put that paper over the crates or not? A. The brown paper?

Q. Yes, sir. A. Yes, sir. We put brown paper over the crates.

Q. All right. A. Yes, sir. That's the question I give. We put brown paper over the crates as we come out.

Q. What is the name of your doctor who advised you not to work this dirty cargo, dusty, dirty cargo? A. Dr. Ralph Dunn.

Q. With respect to gang size, there are many, many different gang sizes, are there not? A. That's correct.

Q. For example, there are five-men gangs? A. Yes. Two-men gangs and three-men gangs and you've [129] got eleven-men gangs. You've got a fourteen-men gang and you have a fifteen-men gang and you've got a seventeen-

men gang and you have an eighteen-men gang and you have a twenty-one-men gang. And you have a ten-men gang.

Q. Has it been your observation that there are fewer containers or more containers moving through the Port of Houston than formerly? A. Well, for the past two or three months it's been more containers moving through.

Q. And in the loading of a vessel with containerized cargo, does the stevedore use as many longshoremen as they would in handling general cargo? A. No. They cut the gang down, the gang size down, to a fourteen-men gang.

Q. Do you know of your own knowledge whether or not they are never even to cut the gang size below fourteen in loading containerized cargo? A. Well, not to my knowledge, but they probably have.

Q. And in response to a question asked by Mr. Smith, you stated that it was sometimes impossible to fit crates snugly. That would certainly be the case if you didn't secure them, would it? A. Yes, sir.

[130] MR. BROCK: I have no other questions now, sir.

THE COURT: Do you have anything further, Mr. Smith?

MR. SMITH: No, Your Honor.

EXAMINATION

By the Court:

Q. Mr. Sessions, do I understand that your gang was the first gang that worked in this particular hold that morning? A. Yes, sir. That morning, to my knowledge, it were.

Q. In other words, your gang opened up the hatch? A. Yes, sir.

Q. And went down into this hold and worked it for the first time? A. Yes, sir.

Q. Do I understand that where you stepped through

this paper was at a place where your gang had not put down any paper? A. Yes, sir.

Q. Do I understand that the place where you stepped through this hole was a place that was covered with paper?

A. Yes, sir.

[131] Q. And according to your testimony, that paper was a different type and color of paper than the paper that your gang had put down? A. Yes, sir.

. . .

[193] DAVID GUY THOMAS,
called as a witness by the plaintiff and, having been first
duly sworn, was examined and testified upon his oath as
follows:

DIRECT EXAMINATION

By Mr. Brock:

Q. State your name, please. A. David Guy Thomas.

Q. And Mr. Thomas, where do you live? A. 5521
Makeig.

Q. Houston, Texas? A. That's correct.

Q. How old a man are you? A. Sixty.

Q. On July 2nd, 1969, were you working with the plain-
tiff in this case, Troy Sessions? A. I were.

Q. Are you a longshoreman? A. I am.

Q. And how long have you been following that trade?
A. Fifteen years.

Q. I would assume, then, that you must have started
sometime about 1955? A. Yes, somewhere along in there.

[194] Q. And what classification do you hold? A. A.

Q. You and Mr. Sessions were working in what hatch?
A. I don't know. I think it was No. 2.

Q. The evidence indicates that it was the No. 1 hatch.
Is that — A. No. 1?

MR. BROCK: Can we stipulate to that?

MR. SMITH: I'll stipulate that is what's on the gang list. The cargo or stowage plan and everything verifies it's No. 1 hatch.

MR. HARMON: The witnesses both testified it was No. 2. I don't know.

THE COURT: Where were your crates?

MR. HARMON: Sir?

THE COURT: Where were your crates?

MR. HARMON: There were some in No. 1 and there were some in No. 2. There were some back in No. 5.

MR. BROCK: The time sheet — the reason I ask about stipulating —

[195] MR. HARMON: The reason I said particularly, judge, is that we did not load any crates that we're going to show were the type that Mr. Sessions testified that he was walking around on top of.

THE COURT: In any hatch?

MR. HARMON: In any hatch. And, therefore, he may have been walking on something, some crates that somebody else stowed.

THE COURT: Okay. I can't get you to — no reason for him to stipulate to it. I don't think the evidence is going to show.

You all haven't settled this case yet?

MR. BROCK: No, sir, we've not settled it.

THE COURT: Okay. Go ahead.

Q. (By Mr. Brock) With respect to the hatch, if the time sheet shows that you were a part of the crew or the gang that was working on the "S. S. Karina" on July 2nd, 1969, that you started work at 10:00 a.m., that would be right, would it? [196] A. That's correct.

Q. And if the time sheet also shows that the hatch was No. 1, would that be more apt to be correct? A. I didn't remember. It's been so long. I didn't remember what hatch it was.

Q. All right. But if the time sheet showed that, that's a part of the timekeeper's job, isn't it, to show what hatch you're working in? A. That is correct.

Q. When you and the other members of the gang went to the "Karina" on July 2nd, 1969, at about 10:00 a.m., did you go first into the hatch to commence working? A. We uncovered the hatch and went down.

Q. First thing you did was uncover the hatch? A. That's right.

Q. Would the fact that the hatch was on indicate that no work had been performed in the Port of Houston on the "Karina" or would it just indicate that no work had been performed that morning? A. It indicate that no work had been did on that hatch that morning.

Q. All right. After taking the hatch cover off, then what did you do? A. Went down and I set up for the load — set up [197] to load the other cargo.

Q. When you went down into the hatch was any portion of the floor already loaded with cargo? A. It was up in that end, the forward end.

Q. The portion of the hatch floor was already loaded? A. Yes, that's correct.

Q. And what kind of cargo was in there insofar as what you could see? A. It looked like boxes with little bands around it. That's what I thought it were.

Q. In other words, it looked like some type of a crate?

A. Yes, that's right.

Q. Or a box? A. Yes, that's right.

Q. I want to show you some pictures and ask you if you recognize any. There are five pictures I'm going to hand you and I want you to look at them very carefully and tell me if any of the cargo that you saw already in the hatch appeared like any of the cargo in those pictures? A. If I remember correctly, that looked like some of them.

Q. All right. Now, you have identified a picture which is marked No. 3 as looking like some of the [198] crates that you saw? A. That's right.

Q. Is that correct? A. That is correct.

THE COURT: Let me see No. 3, Mr. Brock, please. Okay.

Q. (By Mr. Brock) So far as you could tell as a long-shoreman, a member of the gang —

THE COURT: Let me see that picture.

Q. (By Mr. Brock) — did the crates appear to be all right? A. Yes. They appeared to be all right down in where we were.

Q. All right. Did you notice or observe anything about any kind of paper on the crates? A. Yes. Up in the end there was a piece of white paper up at the end. We hadn't gotten that far. It was laying in there and we went in there and there was some white paper laying across the cargo.

Q. Do you have any idea how many crates were covered by the paper? A. No, I do not.

[199] Q. What kind of cargo were you and your gang putting in the No. 1 hatch? A. It was a starch, I think it were.

Q. Starch? A. Yes.

Q. Bagged cargo? A. Yes, bagged cargo.

Q. And approximately how much did the bags weigh?

A. I don't know what they weigh. I wouldn't have any idea what they weighs. I didn't have any idea what they would weigh because, I tell you, I may be wrong.

Q. All right. Were you and the plaintiff, Troy Sessions, working buddies? A. We were.

Q. Does that mean that the two of you were working one end of a pallet? A. That's right.

Q. And were there two other longshoremen working the other end of the pallet? A. That's correct.

Q. Did you notice or observe whether or not the crates were already there when you all went to work? A. Yes. The crates, all the crate cargo was in there [200] when we went to work.

Q. All right. Did you notice whether the crates were on skids, whether or not they were on pallets? A. No. I didn't pay that much attention to it.

Q. All right. A. Whether they was on skids or not.

Q. Your testimony, then, would be that you don't know whether the crates were on the skids or not? A. That's right.

Q. And you don't know whether the crates were on pallets or not? A. Because I didn't observe that much of it.

Q. Was there another foreman gang or another foreman working another pallet of bagged goods? A. Yes, there were, on the offshore side.

Q. They were working both sides? A. We were working both sides. Troy and I was on the inshore side and they was working offshore side.

Q. All right. Did you complete the loading of the bagged goods on the other area of the flooring up to the height of the top of the crates? A. I did.

[201] Q. In doing that work, did you put out any dunnage? A. No, no dunnage.

Q. What kind of flooring was in the No. 1 hatch? Was it steel or was it wood, if you recall? A. I don't recall. I don't want to tell no story. I don't know what kind of flooring it was. I didn't pay that much attention to the flooring.

Q. After you got the bagged goods up to the level of the crates and had covered the flooring, then what did you do? A. We worked putting some bags on the other, on the top of the crates.

Q. And who gave you those instructions and directions? A. The walking foreman and also the foreman.

Q. And the foreman. Are you referring to the gang foreman? A. That's right.

Q. In connection with putting the bagged goods down initially, did you put out any kind of paper? A. Yes. We was using — we'd been using brown paper. We'd put it down as we worked the sacks.

Q. Did you put a layer of paper down in connection with each layer of sacks? A. That's right.

Q. Each layer you men call a key, don't you? [202] A. Yes, that's right.

Q. After you got it level and you started working above the — putting the cargo on top of the crates, were you using paper there for separations? A. On top of the crates!

Q. Yes. A. Yes. We were — we bring our sack. We put the paper down.

Q. And what kind of paper were you putting down? A. We putting down brown paper.

Q. During the course of unloading the pallets did anything happen to Troy Sessions? A. Yes.

Q. What happened to him? A. He walked on top of that white paper and fell through there, walked in a hole.

Q. Did you look to see what was under the white paper after he fell? A. No, I did not look under there.

Q. Did you notice or observe how far he fell in the hole?
A. No, I didn't.

Q. You just noticed that one foot went into this — went into a hole? [203] A. That's right.

Q. And this white paper gave way with him? A. That's right.

Q. And you don't know the width of the hole or the length of the hole? A. No, I do not.

Q. And about what time of the day did this occur? A. This occurred — it must have been around 11:00 o'clock, I believe, or a little later, approximately.

Q. All right. After this occurred did Mr. Sessions — did you help him out, or what happened? A. No. He got out himself and we insisted that he get a ticket.

Q. You insisted that he get a ticket? A. Yes. We all said, told him, "Go get a ticket."

Q. And what do you mean by "Go get a ticket"? A. Get wrote up, any time that you have an injury on a ship or think you've got an injury, you gets a ticket.

Q. And you suggested to him and the other people suggested to him that he go get him a ticket? A. That's right.

Q. At that particular time did Mr. Sessions make any complaints to you about hurting his back? [204] A. Yes. He say, "I believe I hurt my back."

MR. BROCK: All right. I have no other questions.

THE COURT: All right, Mr. Smith.

CROSS EXAMINATION

By Mr. Smith:

Q. Mr. Thomas, as I understand your testimony, you and Mr. Sessions and the other six longshoremen went down in the hold shortly after 10:00 o'clock, after you opened up the hatch? A. That's right.

Q. And you went down a ladder that was in the end of the hatch where the crates were already loaded? A. That's right.

Q. And you walked across the crates to go into the other end of the hatch where you initially, or you started loading these bags of grits? A. That's right.

Q. Now, isn't it true that when you walked across the crates the first time, that they appeared to be level and loaded next to each other in a proper manner? A. Yes. From my observation, that they were tight. [205] We didn't know no holes in those crates.

Q. All right. So when you first went down there, the crates looked good? A. That's right.

Q. As far as walking on top of them? A. That's right.

Q. And you saw this piece of paper that was already down there? A. That's right.

Q. All right. There's no question in your mind that the—none of the Houston Longshoremen put that piece of white paper over that hole? A. No, no, because Houston, we don't use that type of paper that way. We don't use it.

Q. That was a type of separation paper, though, wasn't it? A. That's right, it were.

Q. But it just was not the type that you were using that day? A. That's right.

Q. All right. Now, did this piece of paper completely cover up the hole that Mr. Sessions stepped in? A. Yes. Mr. Sessions, when he stepped on that paper, he fell in the hole. But if you looked at it, [206] you won't know no hole is in that paper.

Q. You couldn't see it? A. No, you couldn't see it.

Q. Because the paper covered it up? A. No, we couldn't see it.

Q. And there was nothing to indicate that there was a hole under there? A. No, nothing.

Q. And this was just a hole or space between two crates,

wasn't it? A. Yes. It was a space between two crates, but how big, I don't know.

Q. You had plenty of light to see by? A. Beg your pardon?

Q. You had plenty of light to see by? A. Oh, yes, plenty of light to see.

Q. Mr. Thomas— A. Uh-hum?

Q. —is it normally the longshoremen's job to put down separation paper when you are loading or unloading cargo? A. That is our job, to put down separation paper.

Q. It's not the seamen's job on a ship to put down the separation paper? A. No, definitely not.

[207] Q. So if there's any separation paper that was put on top of this cargo, would you expect it was done by longshoremen—

MR. HARMON: Your Honor, I object to that. He couldn't possibly know that, as to who put the piece of paper there.

THE COURT: I'll accept his testimony that longshoremen usually put down separation paper and that that's all he knows.

Q. (By Mr. Smith) Have you ever seen a seaman putting down separation paper? A. Never in my life.

Q. Mr. Thomas, how much money did you report to Uncle Sam that you earned last year? A. Close to \$12,000.

Q. \$12,000?

THE COURT: Close to how much?

THE WITNESS: Close to Twelve Thousand.

Q. (By Mr. Smith) And you have an A rating? A. That's right.

MR. SMITH: I pass the witness, Your Honor.

[208]

CROSS EXAMINATION

By Mr. Harmon:

Q. Mr. Thomas—

THE COURT: Was that all for longshoring?

THE WITNESS: That's all. That's all I do is longshoring.

Q. (By Mr. Harmon) Mr. Thomas, did you have occasion to give a written statement sometime after this accident happened to investigators for an insurance company?

A. I did.

MR. HARMON: Do you have a copy of the statement, by chance?

MR. SMITH: Yes, I have a copy.

MR. HARMON: Can I see a copy of it, please?

THE COURT: I thought you said you all exchanged all statements on the pretrial order.

MR. SMITH: The pretrial order was entered before I ever got in the case, Your Honor. I didn't know what had been done.

THE COURT: If you have a copy [209] of the statement, show it to him.

The pretrial order says: All signed, written statements of parties and witnesses contained in the files of Plaintiff, Defendant, Third-Party Plaintiffs, Third Party Defendants, if any, have been exchanged and copies of same filed with the Court.

That's what your pretrial order says.

MR. HARMON: Judge, we were kind of in a hurry to get the pretrial order filed, as I recall. There was some indication that either the case might be dismissed

or it would be a default judgment entered if we didn't get it filed very promptly, so Mr. Brock very quickly called me and I think Bud Cecil to get us to sign the thing and so it was, I think, signed and returned to the Court when perhaps we hadn't actually done some of the things we said there.

THE COURT: Well, is it your statement that I should hold the attorneys in contempt for false swearing?

[210] MR. HARMON: Oh, no, no, particularly since I signed it myself.

MR. BROCK: Mr. Thomas, you never did give me a statement, did you?

THE WITNESS: No.

MR. BROCK: All right.

Q. (By Mr. Harmon) Would you look at the statement, please, Mr. Thomas, and see if that is your signature there?

A. That's my signature.

Q. And you see the last line above your signature, it says, "I've read the above statement. It is true and correct to the best of my knowledge," and then apparently you swore to it before some notary public? A. That is correct.

Q. Now, in this statement here you say you've been — it gives your home address and the number of your local, that you've been longshoring for fifteen years.

It says, "I have been asked what I know about the accident that happened to Troy Sessions." You said, "I recall the accident."

This statement you gave January 29th, 1970. That would be a matter of about six months [211] after the accident. A. I don't know how long it had been, because I didn't keep up with no dates.

Q. I understand. I think Mr. Sessions said the accident happened on the 2nd of July of 1969, so that would be about six months later. Your statement was given on January 29th, 1970. A. And you're saying that would be six months later?

Q. Yes. A. I'll have to get a pencil and have somebody to count that up for me.

THE COURT: That's about six months.

Q. (By Mr. Harmon) Okay. Roughly six months. You say, "I recall the accident. We were working at Manchester docks. We were charging grits." You say, "I am not sure what time we started to work. It had to be a 10:00 a.m. gang or a 1:00 p.m. gang. I do not recall what time the accident happened. I do not recall the name of the ship. Troy was injured in the lower hold of the, I do not recall the hatch number, inshore side."

You said, "He was coming out to land his load. We were setting loads on the inshore [212] side then the next on the offshore side. I was working across from Troy. He was on the inshore side and I was on the offshore side. Troy caught hold of the bridles to help land his load and stepped into this hole."

Now, is that the way you recall it? You say, "This hold was boxes of cargo. These boxes of cargo, we did not load. We were only loading grits. These boxes of cargo was already on board when we arrived to work. We noticed the breaks in the cargo and wondered why they had been stored this way."

Now, is that correct, that you all had noticed some separation between these boxes? A. No, we didn't—no, we didn't observe no—

THE COURT: I can't hear you, Mr. Thomas.

A. No, we didn't observe no breaks. The cargo looked like it looked good.

Q. (By Mr. Harmon) Why in this statement did you say you had noticed the breaks in the cargo if that weren't true? A. Well, it had been a long time and my mind hadn't been refreshed on it, what I mean. It had been a long time and I had never thought about it. [213] and after I begin to think about it, I thought about it, that it was not cracks in it.

Q. All right. You say, "I do not know whether or not anyone reported this breaks in the cargo to anyone. There was not any covering over this cargo."

Is that correct?

A. In the hold all the cargo wasn't covered up. It was just a strip of paper across that cargo. All the boxes wasn't covered up.

Q. You say, "when you see these holes you try to work around them. If all holes were checked in the cargo you could not get any work done. There was breaks in the cargo all over the lower hold. This hole was about seven inches wide. From where I was standing I could not tell how deep it was."

Are you saying here that the hole was seven inches wide? A. Got to be something wrong there because I — in other words, I didn't measure that hole. Got to be something wrong there, seven inches.

Q. See the statement — A. See, I don't have but a very little schooling. I have very little schooling. I came up in the [214] hard times and I don't read too well.

Q. Well, can you read this? A. No, I can't. I can read some of the words, but I can't read all of the words, see. See, I come up the hard way.

Q. Well, can you read what this says right here? A. I see "if," and what this word is, I wouldn't know, see. I can read some words, but some words I cannot.

Q. Well, how much of this last sentence here can you read? A. And it took time and — well, now, what this word is, I don't know. I had to be hung. In other words, I don't read. I had a hard time coming along. I had to work. Small words like that, but I don't know what this word is here. Like that, I don't know what that means.

MR. HARMON: We would like to have that marked, please.

Q. (By Mr. Harmon) Mr. Thomas, how big was this piece of white paper? A. It was the size — it was ample size, the size of a piece of paper that would come off of a roll.

Q. How wide? Two feet wide? A. I don't know how wide, but it's an average roll. [215] You know, the average. If you know anything about longshoring, you know how long paper comes that you make breaks with.

Q. Well, was it as wide as this little green blackboard? A. I don't know. I didn't measure, but it's just a common roll of paper that you buy.

Q. Hold up your hands and indicate how wide you would say. A. You want me to tell a story, which I'm not.

Q. No — A. No. You just try to confuse me.

Q. No, I don't want to confuse you. A. You see, I don't know how long a roll of paper is.

Q. Can you hold up your hand? A. If I hold up my hand, I'll be giving the indication that I do, but I don't know how long a roll of paper is. It come different lengths and I didn't measure that paper to see what width it were.

Q. Was this the only piece of white paper that you saw down there in that hold? A. The only one I remember.

Q. Okay. Now, you saw the piece of paper before Mr. Sessions stepped on it? [216] A. We all saw that paper there.

Q. But nobody went over and picked the paper up?

A. No. You don't go around picking up paper on ships, seeing what's under the cargo. You don't do those kind of things. If you have no way of knowing, when you see a piece of paper you don't be raising the paper. You don't get working on the ship. You get run off a ship looking under the paper.

Q. You realize that there may be spaces between boxes of cargo on a ship, do you not? A. Yes, It be's breaks in cargo.

Q. All right. And you therefore know that if there is a piece of paper laying down on top of boxed cargo that you're walking around on, you try not to walk on the paper because you can't tell whether there might be a break underneath it, isn't that true? A. You don't walk on the paper because you don't know what's under there. You have no reason to know what's under there.

Q. And that's why I'm saying you don't walk on the paper because there might be a space under it, isn't that right? A. No. You walk on — you see some paper spreaded [217] out, you walk on it because you figure the cargo wouldn't be — you wouldn't figure there would be no hole under there. Anybody would do that. When you work, you don't be looking for holes. When the paper is down, you don't look for holes. You look for a place to store your cargo.

Q. You hadn't stepped on the paper, had you? A. I wasn't on that side.

Q. Now, do you happen to recall the fact that the deck was wet where somebody had apparently washed? I'm talking about the deck where the bags were being loaded in the forward end of the hatch. Do you remember? A. I haven't seen no water.

Q. You don't remember that? A. Don't remember no water.

MR. HARMON: I believe that's all.

THE COURT: Any further questions from Mr. Thomas?

MR. BROCK: I have one.

THE COURT: All right.

[218] REDIRECT EXAMINATION

By Mr. Brock:

Q. Mr. Thomas, in connection with the statement which has been marked Third Party Defendant's Exhibit No. 2, did you or not read that before you signed it? A. I read what I could of it before I signed it.

Q. But you didn't read it all? A. No, because, like I explained to you, in other words, I had to work when I was coming up, take care of my sisters, and I didn't get much education, and some of the words I can read and some of them I couldn't.

Q. You gave this statement to a representative of Texas Employers Insurance Association, didn't you? A. That's right.

Q. And in that connection you were relying on him to put it down the way you told him? A. Correct.

Q. Do you recall whether or not you told the representative of Texas Employers Insurance Association that Mr. Sessions stepped on some white paper that was covering a hole? Do you recall whether or not you told him that? [219] A. Let me think. Yes, I think I told him that.

• • •

[233]

TOM HOCKER,

called as a witness by the Plaintiff and, having been first duly sworn, was examined and testified upon his oath as follows:

DIRECT EXAMINATION

By Mr. Brock:

Q. State your name, please, sir. A. Thomas Hocker.

. . .

[234] THE COURT: He is a foreman? He was the foreman?

MR. BROCK: Yes, sir.

THE COURT: Okay.

Q. (By Mr. Brock) Are you a member of Local 872?

A. I am.

. . .

[237] Q. All right. Now, on July 2nd, 1969, is it a fact that you were or were not the gang foreman on the "S.S. Karina"? A. I was.

Q. In what hatch was your gang working? A. No. 1.

Q. Was Troy Sessions a part of your gang? [238]

A. He was.

Q. As gang foreman, did you make the assignments as to where each man in the gang would work? A. Yes, I do.

Q. And where was Troy Sessions assigned to work?

A. In the hold.

Q. Who, if you know, was Troy Sessions' working partner? A. Guy Thomas.

Q. Guy Thomas. Now, of course, we're talking about on July the 2nd, 1969? A. That's right.

Q. That was his working partner on that day. Is that correct, sir? A. (Nodding.)

Q. You'll have to answer out. A. That's correct. But, you see, I has eight men in the hold so they work with one another, but him and guy was supposed to be partners.

. . .

[239] Q. Thank you. At the Union Hall you have a shipping station, do you not? A. That's right.

Q. And you were the gang foreman who had been assigned to pick up a gang for the 10:00 o'clock call? A. I was.

Q. And you went to the shaping station and from the people assembled in the shaping station you picked them up on the basis of their seniority? A. That's right.

Q. And among those was Troy Sessions and Guy Thomas? A. You're right.

Q. At the time you picked those men up you knew, and everybody else knew who inquired, the nature of the cargo that was going to be worked on the "Karina"? A. Let me have that again, please!

Q. When you were assigned as the gang foreman, you knew, from the information furnished the Local, [240] the kind and character of cargo? A. Not at the time. I didn't know until after I got to the dock what we was going to work.

Q. All right. You found out the kind of cargo when you got down to the dock? A. That's right.

Q. So would it also follow that none of the longshoremen knew what cargo you were going to work until you got to the dock? A. We do not know until we get to the dock what we are going to work.

Q. All right. When there is an order put in for a seventeen-man gang, including the gang foreman, do you know that it is going to be general cargo? A. Yes. That's why we classify the men. We know it's going to be general cargo by the amount of men they order.

Q. All right. In other words, if they order a five-man gang, you know that it is going to be another kind of cargo? A. Yes.

Q. But when they order a seventeen-man gang, you know it is going to be general cargo? A. That's right.

Q. Is that right, sir? [241] A. That's right.

Q. Now, when you got down to the "S.S. Karina" at 10:00 were the hatches covered or were they open? A. It was covered. We uncovered it.

Q. You uncovered the hatch, the hatch No. 1? A. Yes.

Q. What duty and responsibility does the gang foreman have when you open up and uncover a hatch? A. Well, the gang foreman is supposed to look in the hatch and see what kind of cargo is already in there, see, and where we're going to work at. The end we worked on didn't have any cargo. The cargo is in the after end.

So I goes down there and look at it and tell my mens how high to bring it up, how to bring it up, and if we going back on that cargo, I tell them we going back on top of this cargo.

Q. All right. Now, as I understand, when you uncovered the hatch, and if you assume that this little dotted square that I have here is the hatch opening and here is the ladder, we'll say, you actually went on the "Karina," walked to the hatch, opened — saw to it that your people [242] opened the hatch cover, and then you went down the hatch? A. And checked it.

Q. And you checked it. And when you got down there, as I understood your testimony, the aft end of this particular Hatch No. 1 was already loaded with cargo? A. Had cargo in it. It wasn't loaded.

Q. The aft end? A. The aft end had cargo there but it wasn't loaded.

THE COURT: What do you mean — he means it was not full, I assume?

THE WITNESS: That's right.

Q. (By Mr. Brock) The forward end — A. Didn't have any in it.

Q. — Didn't have any? A. That's right.

Q. And how many layers or tiers did the aft end have? A. I think it was one high.

Q. One high. In other words, if this is the floor — A. Yes.

Q. — you had one high? A. Yes, sir.

Q. Is that correct? [243] A. Yes, that's right.

Q. And what kind of cargo did it appear to be? A. Well, it was palletized cargo.

Q. All right. A. I think it was rocks or bricks or something. I don't know exactly what kind it is, it's been so long now.

Q. You think it was — A. Rocks or bricks or something, and palletized. I don't know what it was.

Q. All right. A. But I know it was palletized.

Q. Now, in connection with that particular cargo, let me just hand you all the photographs that I have and ask you to look at them in order that we may be of whatever help we can to the Court.

I have handed you seven photographs, and I ask you, in connection with those seven, do any one of those photographs appear to be the kind of cargo that was already in hatch No. 1 when you started to work? A. The crates looked about the same height, but I don't know what kind of cargo it is.

Q. Well, my question may have just been misleading. You said you had crated cargo in there? [244] A. Yes. The crates looked the same.

THE COURT: I can't hear you, Mr. Hocker. You'll have to speak up so I can hear you, sir.

THE WITNESS: I say the crates look kind of like it, but I don't know whether it's the same height or what? But that's the way it be.

Q. (By Mr. Brock) All right. The crates looked like they were the same height? A. Yes.

Q. Now, my question is, did you notice or observe whether the crates were banded? A. I didn't look that close to them to see whether they was banded.

Q. Did you notice whether or not the crates were on pallets? A. Supposed to be. Yes, they were on pallets where a forklift go under them, a forklift pick them up. You couldn't handle them with hands.

Q. So far as you know, it was crated cargo that was on pallets? Is that correct? A. That's right.

Q. When you went down in there did you notice or observe whether or not any of the—strike that. [245] When you went into Hatch No. 1, did you notice whether or not the crates were secured by chocking, by cable, by chain or by anything else? A. No, the crates weren't secured.

Q. They were not secured? A. No, sir.

Q. Did you notice whether or not, with respect to the particular crates in question, whether there was any paper, cardboard, corrugated board, or anything else on top of the crates? A. At one place in the wing where I see the paper, some white paper, I don't know. I don't know whether they had it up there for separation paper or what, but it was spread about ten feet in the wing, down in the wing.

Q. On the inshore or offshore side, if you recall? A. I disremember whether it was on the starboard or port.

Q. All right. In any event, you saw some white paper?

A. Yes.

Q. Did it appear to be like butcher paper, only white, or did it appear to be like corrugated paper? A. It could have been white corrugated paper. [246] A. It could have been.

Q. Could have been? A. Yes, But, see, we don't use that kind of paper here.

Q. Do they use white butcher paper here? A. We use brown.

Q. You use brown butcher paper? A. At the time, they was using brown paper.

Q. As I believe you testified, you saw this paper which was about a ten-foot square? A. Straight down the wing.

Q. Well, it was about ten foot long? A. Yes.

Q. How wide? A. Oh, I'll say three feet or four.

Q. Now, if this is the inshore side and this is the offshore—in other words, the starboard and the port side—and if this is the aft end of Hatch No. 1, where would the paper have been? over here, here, or whereabouts? A. I disremember now which side it was on. It was on the side.

Q. After you found that paper, did you go over there and pick it up— A. No.

[247] Q. —and look in underneath? A. No, no. We don't do that.

Q. You don't do it? A. No.

Q. Why? A. Why? Because if the paper is already down, my orders is to leave it down and put cargo on the top of it and put my paper down as I come out.

Q. Is that the orders you were given by the walking foreman? A. That's right. That's all of them we do that all the time. We don't ever pick up paper.

Q. And is that what you instructed your gang to do?
A. That's right. They don't pick it up.

Q. When you saw that white paper in there, did you say anything to anybody in the ship's crew about it? A. No.

Q. Did you say anything to your walking foreman about it? A. No.

Q. When you went down in there to check the condition of the cargo, did it appear to you to be level across the top? [248] A. It did.

Q. So far as you determined by your investigation, did you determine whether or not there were any breaks or openings in the cargo? A. I didn't.

Q. You did not? A. Didn't bother the paper.

Q. All right. A. That was almost level all the way over.

Q. And then you put your gang to work? Is that correct? A. That's right.

Q. Were you in the hatch No. 1 when Mr. Sessions got hurt? A. No, I wasn't.

Q. Was it reported to you that he got hurt? A. It was.

Q. Did you go down into hatch No. 1— A. At 1:00 o'clock.

Q. —to check? A. At 1:00 o'clock.

Q. At 1:00 o'clock? A. Yes.

Q. About what time of the morning did he get hurt?
A. It was pretty close to noon. About, I'd say, [249] about a quarter or twenty minutes or a quarter to twelve.

Q. Between a quarter and twenty minutes to twelve?
A. Yes, something like that, because we just finished — we just finished going to dinner.

Q. Who was it that pointed out to you where Troy Sessions got hurt? A. Well, at 1:00 o'clock when I went

down there and checked the hold I seen where the paper had went down between the crate.

Q. Did somebody point it out to you and say, "This is where Mr. Sessions got hurt"? A. That's right.

Q. Who was that? A. Guy.

Q. Guy Thomas? A. Yes.

Q. Now, at that time, did you lift the paper up to see what it was that had caused him to fall through? A. No. I seen what it were. See, the paper is already down in the hole. I could see how large the hole was. It was about, I guess, about six or seven inches.

Q. Wide? [250] A. No. Something like that, where you could step your feet down in. See, the paper is already down there.

Q. How long was the hole? A. It was long as a crate, about three or four feet long.

Q. Long as the crate? A. Yes.

Q. Did you report what you found to your employer, the stevedore? A. No.

Q. All right. Now, you got your instruction on July 2nd, '69, from the walking foreman? It that correct, sir?

A. That's right. I gets my orders from him.

Q. I want to ask you to assume—I mean, I want to ask you a question about how you people conduct your work. Let's assume that instead of discharging, instead of putting bag cargo on this ship, let's assume that you people had been the ones that had gone in here and put the crates. A. Uh-hum.

Q. The crates that were already there when you all went to work. And you got up here and that was all the crates to be loaded. [251] A. (Nodding.)

Q. So you got this area that is empty. You understand what I'm talking about? A. Right.

Q. Who in the usual course of business decides whether to secure those crates or to leave them unsecured? A.

Who is supposed to decide to secure them?

Q. Who makes that decision? A. Well, that would be either the superintendent or the mate.

Q. Either the superintendent — A. Or the mate.

Q. — or the mate? A. That's right.

Q. In other words, the chief mate, the first mate? A. Well, it might be assistant. It could be the first or chief.

Q. All right. Now, as long as you've been in the longshore work, you know, do you not, that if the stevedore you are working for, if he secures this cargo, he is going to charge for securing it? A. That's right.

Q. Isn't that correct, sir? A. That's right.

[252] Q. And as long as you have been in this business, that charge is going to be made to the ship, isn't it? A. That's right.

. . .

Q. (By Mr. Brock) As between the superintendent or the chief mate or first mate, do you know who makes the ultimate decision — A. I do not.

Q. — about whether or not to secure the cargo? A. No, I don't.

Q. All right. Did you see Mr. Sessions after he got [253] hurt? I'm talking about — A. That day?

Q. — the day of the accident. A. No.

Q. As I understand, you folks do not have a gang system any longer; in other words, like you had before the hiring hall plan? A. I didn't get you.

Q. All right. I can understand why it is misleading. Since you adopted the hiring hall and seniority plan, you don't have the regular gang system any more? A. No.

Q. Since July 2nd, 1969, have you seen Troy Sessions down there at the waterfront? A. I have.

Q. Has Troy Sessions worked for you in your gang? A. Since then?

Q. Yes, sir. A. No, he hasn't worked since then.

Q. In other words, he hasn't been a part of your gang since July 2nd, 1969? A. Well, he just have started back to work. He haven't been working regular.

Q. All right. [254] A. I guess he started back to work. I wouldn't say he had and I wouldn't say he wasn't. I see him once in a while.

Q. My question simply is, has he worked in your gang?
A. No.

. . .

[259] Q. And I gather when you first went down into the hold that morning and saw the crates that were already there, the top of the crates looked fine? Is that right? A. That's right.

Q. You didn't see any holes or spaces or anything that needed covering up? A. I didn't. Quite naturally, if I seen the hole, I'd'a put dunnage over it.

MR. SMITH: All right. Your Honor, I have here the original of the gang list, which I've shown to the other attorneys and they don't object to it.

THE COURT: That is Defendant's Exhibit what?

MR. SMITH: No. 1.

THE COURT: Do you want something, Mr. Moody?

MR. MOODY: No, sir.

Q. (By Mr. Smith) Mr. Hocker, I'll show you Defendant's Exhibit No. 1. Is that the original of the gang list of the gang that went to work in the No. 1 hatch on the "Karina" on July 2, 1969? A. That's right. That's the gang.

Q. All right, sir. It shows you worked the No. 1 [260] hatch, does it not? A. That's right.

Q. It shows you as gang foreman over here at the top?

A. That's right.

Q. All right, sir. It shows you went to work at 10:00 that morning? A. That's right.

Q. You just keep that and refer to it, if you'd like. When you first looked down into the hatch and went down in there after they opened it up, it was apparent that these crates that we are talking about had arrived with the ship? Is that correct? A. Was what?

Q. The crates that we are talking about that were down in the lower hold of the No. 1 hatch, there is no doubt in your mind that those crates came in with the vessel? A. They come in with the ship, they did.

Q. And did you see any — or were you the first man down in the hatch? A. I wasn't.

Q. You weren't the first man down there? A. (Shaking head.)

[261] Q. Did you see any of your fellow longshoremen carrying any white paper down into the hold that morning?

A. No. We didn't carry any down there.

Q. All right, sir. Is putting down separation paper longshoreman's work or seaman's work? A. Longshoreman's work.

Q. All right, sir. If this cargo of crates was loaded over in Mobile, Alabama, is that where this piece of white paper probably came from?

MR. HARMON: Your Honor, I object to that. I don't think he could possibly say.

THE COURT: I sustain that objection.

Q. (By Mr. Smith) Mr. Hocker, is it unusual for longshoremen to load a particular cargo such as these types of crates to put paper on top of those crates?

MR. HARMON: I'm going to object to that as to what is unusual.

THE COURT: I'll sustain that objection. He's already testified. It wasn't his. They didn't put it down.

MR. SMITH: But, your Honor, I [262] think he's an expert as to what longshoremen do in general.

THE COURT: Well, he already testified that they don't put any—they put separation paper down. Longshoremen put separation paper, right?

MR. SMITH: Yes, sir.

THE COURT: That's part of their job?

MR. SMITH: Yes, sir.

THE COURT: They don't pick up any paper, right?

MR. SMITH: Yes, sir.

THE COURT: Okay.

Q. (By Mr. Smith) Have you ever seen a seaman put down any separation paper on cargo? A. No, I haven't.

Q. All right, sir. Now, the cargo that was in the hold, these crates that we're talking about, assume that these are crates of brick, brickbats, now, would that be pretty heavy?

A. Sure, it's heavy.

Q. Something a man could not pick up one end of the crate, could he? A. That's right.

[263] Q. Now, in your expert opinion, how many years since 1934 have you been longshoring? A. I've been a longshoreman since 1934.

Q. All right, sir. Now, do you ever secure skids of bricks, just one tier high, when loaded in the lower hold like this?

A. No.

Q. You don't? A. No.

Q. Tell Judge Singleton why not. A. It's too heavy. You won't move no way.

Q. You don't have to secure them? A. Too heavy.

Q. Too heavy. You just put them there and they stay where you put them? A. That's right. They ain't going nowhere.

Q. Isn't this particularly true when you have one tier high in the lower hold? A. That's right.

Q. Well, the fact that this cargo wasn't secured was because it didn't need to be secured?

MR. BROCK: I object to that. That calls for a conclusion.

THE COURT: I sustain that objection.

[264] Q. (By Mr. Smith) Well, is it your testimony that in all the years of your longshoring experience, you have never seen a cargo—crates of bricks one tier high like this secured?

MR. BROCK: I further object to it on the grounds that he hasn't testified that he knew it was in the crates. He said he didn't know.

THE COURT: Well, he's asking him. He has assumed by his questions that it's bricks. I don't know—

MR. BROCK: Well, he sure is assuming.

MR. HARMON: It's very likely that it wasn't bricks, Judge.

THE COURT: Well, I don't know what it was.

MR. HARMON: Sacks of furnace liner. There was a few pallets of bricks. Most of it was hundred-pound sacks of furnace liner.

THE COURT: I don't know what was in it, but Mr. Smith's questions of this witness have assumed that they were crates of brick.

[265] (By Mr. Smith) Well, assume they were crates of bricks, fire bricks, some type of ceramic or brick object —

MR. HARMON: Your Honor, I am going to object.

MR. SMITH: The stowage plan — we're going to bring that out later by the ship's cargo stowage plan.

THE COURT: Can't you stipulate as to what they were?

MR. HARMON: Yes, It wasn't brick.

THE WITNESS: Whatever it was, it was heavy.

MR. SMITH: Ninety-two tons of it, wasn't it?

MR. HARMON: What? It's bags of furnace lining. Here's thirty pallets of furnace lining, here's twenty-seven pallets of it, here's nineteen pallets of furnace lining. There were six pallets of fire brick and there were eight pallets of mineral wool block, but the balance of it was furnace lining, which is bag material, which is not brick.

[266] MR. SMITH: Your Honor, they have about eighty crates that weighed a total of ninety-two tons. The point I'm trying to make, I don't care what was in it, they were heavy and didn't need to be secured.

THE COURT: I think you're going to have to bring a witness here to testify to that.

MR. SMITH: This is an expert witness.

THE COURT: He is an expert longshoreman. He's not an expert loader and storer of cargo, is he?

Q. (By Mr. Smith) Mr. Hocker, do you consider that you are an expert as to how to properly stow cargo of various types? A. I think I am.

THE COURT: All right.

Q. (By Mr. Smith) All right. Have you stowed skids of bricks or other smaller type commodities in your many years of longshoring? A. I have.

Q. Do you think you know the proper way to do it? A. I sure do.

[267] Q. All right. In your opinion, would a cargo of crates such as these in the lower hold of the No. 1 hatch that you saw on the morning of July 2, 1969, in your opinion, should these crates of heavy objects have been secured in any way? A. I don't think they needed to be secured.

Q. All right. A. All I say about it, whatever that they carry in there, they didn't put it in tight. They left a crack in there.

Q. That one crack that Mr. Sessions fell in? A. Right.

Q. But the rest of it was tight, snugged up? A. There was just one.

Q. There was just one, one crack? A. Yes.

Q. In the whole stow? A. Yes.

THE COURT: Big oaks from little acorns grow. It only takes one, Mr. Smith.

MR. SMITH: I pass the witness, your Honor.

THE COURT: All right, Mr. Harmon.

[268] CROSS EXAMINATION

By Mr. Harmon:

Q. Mr. Hocker, have you ever seen—this white paper that you described, as I understand it, was just one piece of paper? Is that correct? A. What's that?

Q. I say, you saw just one piece of white paper? A. Yes, sir. It was about ten feet long, I did, in the wing.

Q. Okay. You say ten feet long and about three or four feet wide? A. Yes.

Q. And just one piece? A. That's right. In other

words, it looked to me like this, like somebody started putting down the separation paper and they cut the gang out there and says that's all the cargo they're going to put down there and they just left the paper down in the hold. That's what it looked to me like.

Q. Was it corrugated paper? A. I don't know whether it was corrugated or kraft paper. See, I don't know which. It's been there so long.

THE COURT: Kraft?

[269] THE WITNESS: Yes, sir.

Q. (By Mr. Harmon) But it was definitely white? A. Yes.

Q. All right. Have you ever seen that kind of separation paper used in Houston? A. No, we haven't used that kind. Some seamen use it, but they don't use it, I don't think. I've never seen them use it.

Q. Who is "them"? A. Huh?

Q. Who is "them"? A. The port.

Q. Sir? A. The stevedores we were talking about now, the port.

Q. Midgulf? A. I mean Midgulf.

Q. All right. Have you ever seen any other ships come in from any other ports that have had that kind of separation paper in them? A. That white paper?

Q. Yes. A. I have.

Q. You have seen them. Do you know whether or not there's certain ports that use that type separation [270] paper? A. I don't know about the other ports. I couldn't tell you.

Q. You don't know what ports may use white paper? A. No.

Q. But in Houston at least, Midgulf doesn't use it? A. That's right.

Q. All right. A. So all I can tell you, what kind we use around here.

Q. Do you recall whether or not this ship had McGregor Hatches or whether it had hatchboards? A. They had hatchboards, I think.

Q. All right. Now, this ship had a tween deck in it, did it not? A. I think it did, if I'm not mistaken. It's been three years. And I don't know what happened in three years.

Q. Do you recall whether or not the hatch opening in the tween deck going on down into the lower hold, whether that hatch opening was open or closed before your gang went down there? A. I think we didn't hatch it off the tween deck. I think. But I know we opened the main deck.

Q. All right. This one piece of paper that was down [271] there was not going to be of any use to your men, was it? A. (Shaking head.)

THE COURT: You have to answer up, Mr. Hocker.

THE WITNESS: No. It wouldn't be any use to us, but we just left it there because it looked like separation paper and we come on top of it with sacks and just throw these sacks down on them and the gentleman just stepped in the hole. That's all I can tell you.

Q. (By Mr. Harmon) Now — A. We didn't move other ports' separation, if its paper.

Q. Of course, this was just one piece of paper, though? This wasn't like the separation had been completed, was it?

A. I didn't get you.

Q. Sir? A. I didn't get you.

Q. I say, you don't move separation paper if the cargo has come in with separation paper all over the top of it?

A. No, we don't move it if it's all over the top. [272] If it's one piece laid down, we don't move it. One piece of paper, we don't move it.

Q. You realize that when you have cargo that's in crates, you might have some cracks between the crates, do you not? A. Yes.

Q. That's not at all uncommon to find, is it? A. Yes.

Q. Is that right? A. Yes. But still we don't move the paper. Whoever put the paper down, they should have had dunnage over the cracks.

Q. Well, how do you know whether or not there might be a crack with the paper on top of it so it's not going to be safe for your men to walk on the paper if you don't have somebody pick up this ten-foot piece of paper and look underneath it? A. Quite naturally, I would think this: If the paper is down there, we don't supposed to move it. See, if another port spreads paper down, they come from another port — Mobile, Dallas, anywhere — and we're not supposed to move the paper. Just throw cargo on top of it. We puts our paper down as we go.

Q. Has Midgulf told you not to ever pick up a piece [273] of separation paper? A. No, nobody told us that.

Q. Nobody told you that? A. No need in picking it up what was already down there.

Q. Now, after Mr. Sessions' accident happened, did you have them pick up this piece of paper? A. No, we didn't pick it up.

Q. Did you have them put dunnage down? A. We put two pieces of dunnage across the hole, put paper on top of it.

THE COURT: On this particular hole?

THE WITNESS: Yes.

THE COURT: That Mr. Thomas stepped through?

THE WITNESS: Yes.

THE COURT: You put two pieces of dunnage and paper on top of it?

THE WITNESS: That's right.

THE COURT: And who told you to do that?

THE WITNESS: Nobody.

THE COURT: I see.

Q. (By Mr. Harmon) That was your responsibility as [274] a gang foreman, was it not? A. No.

Q. Huh? A. No.

Q. It wasn't? A. You say that's my responsibility?

Q. Yes. A. My responsibility is to see it works safely and I tells the men, I tell them daily, I say, if there is a hole down there, we see it, put dunnage over it. If there's any paper in the hold, any paper down there, we don't move the paper. But we don't put dunnage on top of the paper.

Q. Do you recall whether this was a foreign ship? A. Huh?

Q. Do you recall if this was a foreign ship? A. I don't know what kind of ship it was. See, I don't keep a record of the ship.

Q. Now, your men had not done any cleaning down in the hold, had they? A. No.

Q. You do know that sometimes the crews of foreign ships will do cleaning down in the hold while the ship is at sea?

MR. SMITH: Your Honor, I object. [275] That is complete speculation that he's been to sea on foreign ships.

THE COURT: I'll sustain that objection.

Q. (By Mr. Harmon) Did you have occasion to give a written statement to anybody concerning Mr. Sessions' accident? A. Have I given any written—no, I haven't.

Q. You have not. All right. And you're sure that this was white paper? A. That's right.

Q. It wasn't a piece of corrugated— A. No, it wasn't no corrugated.

Q. All right. Now, the crates that you saw, were they covered on the top with paper like this or cardboard like this? A. The white paper that I done showed you twice, this is the last time, the paper is on the top of the crate like this. See, like you put a sheet on something.

Q. No. I'm asking you about the crates. Were the top of the crates covered with cardboard like that? A. I didn't check it. I don't know. I didn't check them that tight to see if there was any paper on [276] top, any cardboard.

Q. Well, you had to look at the top to see what your men were going to work on, didn't you? A. The boards on top of the crate were high. I couldn't see under them.

Q. You say there were boards on top of the crate? A. The crates were crated up and they had boards on top of it.

Q. They had boards on top of it? A. Them pictures wasn't taken on the ship. Don't bring them over here.

Q. Well, just let me ask you this. A. They wasn't taken on the ship.

Q. You see picture No. 10, were the crates this type of crates with boards on top or this type of crates that you see on No. 6 that has the cardboard on top? A. I don't know what kind of crate. I know it was flat crate about like this, had boards on top of it.

Q. It definitely had boards on top of it? You're sure about that? A. It had close together except one place.

Q. And you're sure that these crates had boards on

top of it? [277] A. That's right, what I seen, but them wasn't on the ship.

MR. HARMON: Thank you.

THE WITNESS: Thank you.

* * *

[286] Q. (By Mr. Brock) Do you know how much those crates weighed that were in the aft end of hatch No. 1 when you went in the hold of the ship? A. Do I know how much they weighed?

Q. Yes, sir, each crate. A. No, I couldn't tell you how much they weighed because I didn't look at the weight. All I know, they was too heavy for a man to handle.

* * *

[289] MR. SMITH: These were interrogatories propounded to Cooper Stevedores by the Defendant.

"Question: Please give the date during June and July, 1969, that you stevedored the "S.S. Karina" at Mobile?

"Answer: June 27-28th, 1969. All of this activity took place at Mobile, Alabama.

"Question: Did longshoremen in your [290] employ load cargo in the "S.S. Karina's No. 1 lower hold at Mobile during June and July of 1969 —"

THE COURT: Let me ask you something. Can't you just give me those interrogatories and let me read them?

MR. SMITH: Yes, sir, if you can take them into evidence.

THE COURT: Certainly. You can file them and mark them as an exhibit. This takes the Court Reporter's time and Everybody's time. I believe I can read them about as fast as you all can.

• • •

[292] MR. SMITH: At this time, I tender Defendant's Exhibit No. 2 into evidence, which everybody has been furnished a copy of, which verifies that they were working in the No. 1 hatch.

All right. At this time, I call Mr. Juckes, Midgulf Stevedore Superintendent. He's a witness.

THE COURT: You don't list him.

MR. SMITH: Superintendent.

THE COURT: Is he a supervisor of personnel of the stevedores? Is that what you say he is?

MR. SMITH: Yes, sir.

THE COURT: All right.

[293] RUSSELL A. JUCKES,

called as witness by the Defendant and, having been first duly sworn, was examined and testified upon his oath as follows:

DIRECT EXAMINATION

By Mr. Smith:

Q. Mr. Juckes, would you —

THE COURT: How do you spell his name?

THE WITNESS: J-U-C-K-E-S.

THE COURT: J-U-C-K-E-S.

Q. (By Mr. Smith) Mr. Juckes, would you state your name for the record, please? A. Russell A. Juckes.

Q. What do you do for a living? A. I'm a Stevedore Superintendent for Midgulf Stevedores.

Q. How long have you been a stevedore superintendent?
A. About ten years.

Q. Would you explain to Judge Singleton in brief summary what the job of a stevedore superintendent entails working in the Port of Houston? A. We supervise the loading and discharging of vessels and the stowage of cargo.

[2994] Q. Are you the head stevedore, superintendent or the head stevedore, supervisor or personnel as far as the longshoring work goes on any particular ship you may be assigned to? A. Yes.

Q. I gather you load all kinds of cargoes, various types of ships? A. Yes.

Q. I assume some of them are simple, easy-type jobs, some of them are more complicated? A. That's right.

Q. And you've been working in this supervisory capacity for some ten years? A. Yes.

Q. All right, sir. Did you have an occasion to be a superintendent on board the "S.S. Karina" on June the 2nd of 1969? A. Yes.

MR. SMITH: Your Honor, at this time I tender into evidence the Defendant's Exhibit No. 3, the cargo stowage plan that was mentioned in the pretrial order.

MR. HARMON: No objection.

THE COURT: Defendant's Exhibit what?

[295] MR. SMITH: 3. Defendant's Exhibit 3.

Q. (By Mr. Smith) I also show you Defendant's Exhibit 1, which is already in evidence, which is the gang list of the gang.

Also, Mr. Juckes, we have your employer's complete stevedore file available, so if at any time you wish to refer to any other records concerning this particular job in an-

swer to any of the questions by me or Mr. Brock or Mr. Harmon or Judge Singleton, please feel free to ask for any records that will help you answer the questions. A. All right.

Q. They're very voluminous and I don't intend to go through all of them.

MR. HARMON: While you're asking the questions, can I look at them?

MR. SMITH: Yes.

Q. (By Mr. Smith) Mr. Juckes, would you explain to Judge Singleton what Defendant's Exhibit 3, this final cargo stowage plan is and what it indicates?

. . .

[297] Q. (By Mr. Smith) Would you explain to Judge Singleton how this cargo stowage plan is made up as the vessel moves from port to port and how this is the final plan? [298] A. Well, on this vessel, she started in Mobile. When they completed loading their cargo, they indicated the stowage on this plan. And then she went to New Orleans. They did the same. We did the same thing at Houston. And at the final port in Galveston they did the same.

Q. And then the ship left Galveston for foreign ports?
A. Right.

Q. All right, sir. Now, in reference to the No. 1 hold of the "Karina," would you tell Judge Singleton what the cargo stowage plan shows? A. Well, it shows skids of firebrick and clay loaded at Mobile.

Q. How many and how much, or do they just give weight? A. Ninety-two tons.

Q. All right, sir. What else was — A. The balance of the cargo is Houston cargo, loaded here, of course.

Q. All right, sir.

THE COURT: Which one is the No. 1 hold?

MR. SMITH: It's the one on the right-hand side.

[299] THE WITNESS: On the right, all the way at the bottom.

MR. BROCK: Right bottom.

THE COURT: Right bottom, right?

MR. BROCK: Yes, sir. Next-to-last-written-in column where it says A/O 1 Mobile, skids, brick and clay, 92 tons. Isn't that what you're talking about?

THE WITNESS: Yes.

THE COURT: I see, but I don't see where it says —

Oh, Mobile. Okay. Brick and clay, ninety-two tons. I got it.

Q. (By Mr. Smith) So there is only the Mobile bricks and the Houston cargo that you all loaded when the ship got here? A. That's right.

Q. All right, sir. Now, when did the "Karina" arrive in Houston? A. July the 2nd at 8:30 in the morning.

Q. All right, sir. With reference to the gang list, the original of which is in evidence, when did the longshoremen first go to work on the No. 1 hatch? [300] A. At 10:00 a.m. on the 2nd.

Q. So the vessel got in at 8:30 that morning and the longshoremen commenced work at about 10:00? A. 10:00, that's right. Their time started at 10:00 o'clock.

Q. That's the No. 1 hatch? A. No. 1 hatch.

Q. All right, sir. When you go aboard a vessel to work in the holds or load or discharge or whatever jobs you have

to do, do you send Midgulf's longshoremen in the holds that you're not going to load or unload any cargo? A. No.

Q. If a ship comes in here that's going from here to New Orleans and other ports, and say like they tell you that you're not going to load anything in hatch No. 2, you don't open that hatch up and go down in there unless you're going to load or unload cargo? A. No.

Q. It stays closed and you work the hatches that you are assigned cargo to work? A. That's right.

Q. All right, sir. Now, in loading skids, palletized skids or bricks, if a cargo is going to be loaded [301] on top of that, it's not unusual to put separation paper between it? A. No. It might be done.

Q. All right. Now, was Mobile the first port of call as far as this cargo stowage plan indicates? A. Yes.

Q. So if the ship was empty or about empty at that time, then they were just making up their cargo stowage plan on the return voyage, Mobile being the first port? A. Yes.

Q. All right. So I gather that the stevedores and the ship's officers had the whole ship within which to decide where they wanted to put different cargo that they thought they were going to carry back on their trip back? A. Yes.

Q. All right. Is it unusual at the initial stages of making up the cargo stowage plan to decide on short notice to not put cargo in one hatch and put it in another? A. Yes.

Q. All right, sir. And so it wouldn't be unusual, if they loaded bricks in the No. 1 hatch, if they maybe at first decided or thought they were [302] going to put some cargo above it, to put some separation paper down—

MR. HARMON: Objection, I think this is highly speculative and in the absence of him having some proof as to what happened, I don't think it's material.

THE COURT: I'll sustain the objection.

Q. (By Mr. Smith) Mr. Juckes, have you ever seen longshoremen start to put separation paper down on the cargo and then have them stop when they told them they were not going to load any cargo over at that port?

MR. HARMON: Your Honor, I object to this. I think it is highly speculative to say what he's seen on some other occasion.

THE COURT: I sustain the objection.

Q. (By Mr. Smith) Well, Mr. Juckes, assume for me that when the "Karina" came into Houston on the morning of July the 2nd of 1969, that besides the crates of palletized bricks that were in the No. 1 hatch, assume there was a piece of [303] white paper about ten feet long, three or four feet wide, laying on top of the skids of cargo in the hold; assume that was there when the longshoremen first went in there. Now, based on your experience as a stevedore superintendent and knowledge of stevedoring operations, do you have an opinion as to whether or not that piece of paper was loaded with the cargo in Mobile?

MR. HARMON: Your Honor, I am going to object to that, too. I think that, again, is highly speculative.

THE COURT: I will let him answer that question. I will overrule it.

A. It could happen.

Q. (By Mr. Smith) Putting down separation paper is primarily longshoremen's work, isn't it? A. Yes.

Q. All right. Have you ever seen seamen putting down separation paper? A. No.

Q. If there was no cargo loaded or unloaded in the No. 1 hatch in New Orleans, would they have any reason to go in there? A. Not that I can see.

Q. So isn't it true that the paper I'm talking about, [304] the piece of white paper, more than likely went in the ship in Mobile?

MR. HARMON: I'm going to object to that again. That is highly speculative.

THE COURT: I will sustain the objection.

Q. (By Mr. Smith) Mr. Jukes, as far as you were aware, did your longshoremen have any trouble loading the assigned cargo in the No. 1 hatch? A. No.

Q. Was this, as far as you know, just an ordinary, average job? A. Yes, bagged cargo, bagged grits, and cases of rice and pallets of rubber. That was all. Just normal cargo.

Q. All right. Does Midgulf stevedores use brown separation paper? A. Yes.

THE COURT: What does Paranam, P-a-r-a-n-a-m, mean?

THE WITNESS: It's a port down in South America.

THE COURT: That's where this was destined for. Loaded in Mobile and [305] destined for Paranam. Is that what it means on this stowage plan?

THE WITNESS: Yes, sir.

THE COURT: All right.

Q. (By Mr. Smith) Mr. Jukes, in your ten years of working as a stevedore superintendent, have you seen skids of firebricks such as we are talking about, palletized skids, loaded and unloaded in Houston? A. We don't have too much firebrick in Houston. I have seen them, yes.

Q. Where are those pictures? A. Here they are. Are these the ones?

Q. Yes. Would you, as a stevedore superintendent, if you had some eighty-odd palletized crates that weighed a total of ninety-six tons, as shown in the cargo stowage plan, if you lowered them in just one end of the lower hold — say the No. 1 hatch on this ship — would you order a securing clamp, belt, or a bunch of cables down there or any other type of securing mechanism to keep a heavy cargo like this from shifting? A. Not between here and Mobile.

Q. All right. Why not? A. Because it won't go anywhere. It wouldn't move [306] anywhere.

Q. It wouldn't move? A. If it was well stowed, no.

Q. Too heavy? A. Yes. Too heavy, and it's wood on wood — or wood on steel, or it may be wood on wood if they had a wooden landing mat on that ship. I don't recall if they did.

MR. SMITH: All right. I pass the witness, judge.

THE COURT: All right, Mr. Harmon.

MR. HARMON: Is it me or Mr. Brock?

CROSS EXAMINATION

By Mr. Harmon:

Q. Mr. Juckes, this was a German vessel, was it not?

A. I believe so.

Q. And the vessel was under charter at Alcoa? A. Yes.

Q. Did you have a gentleman in Mobile with whom you would correspond by cable or telephone by the name of Carnes? A. Yes.

Q. Is he with Alcoa? [307] A. I understand he left. He was with Alcoa.

Q. Well, he was with Alcoa at the time this incident happened? A. Yes.

Q. Did Alcoa have an office here in Houston? A. They did at one time, but I don't think at the time — maybe they only had a solicitation office here, anyway, one man.

Q. All right. Now, insofar as your company's arrangements, Midgulf Stevedores is a subsidiary of a steamship company, is it not? A. Yes.

Q. Central Gulf? A. Yes.

Q. And do you know who it is exactly who make the arrangements to furnish separation paper that you're going to use on any Alcoa ship? A. I would.

Q. You would do that, yourself? A. Yes.

Q. You don't know what the situation was at Mobile, do you? A. No.

Q. All right. Have you ever had occasion to see any white corrugated separation paper? [308] A. I can't recall it.

Q. That's rather unusual type paper, it is not, sir? A. I've never used it myself, no. Some other companies may use it. I don't know.

Q. Did you happen to go down on this vessel when she came in? A. Yes.

Q. Did you happen to observe the hatches after they were opened? A. Yes.

Q. Did you see any white separation paper in the No. 1 hatch? A. I don't recall. It's been too long ago and I've seen a lot of ships since then.

Q. Well, that's a rather unusual kind of paper, is it not, sir? That is, if you had seen one single strip of white paper on top of some cartons of cargo, wouldn't that be rather unusual? A. It would be for here. Most of the companies here use brown paper.

Q. Right. A. Now, what they do in Mobile, I don't know.

Q. And you don't recall having seen any such — a single

strip of white separation paper laying [309] on top of these crates? A. No, I don't recall it.

Q. When you looked down in the hatch on top of these crates did they appear to be stowed in proper condition?

A. Yes.

Q. I mean, they didn't appear to be in disarray or have any cracks or any separations between them? A. No. I mean —

Q. Of course, you're looking to your stevedore superintendent—I mean, to your walking foreman and to your gang foreman to go and check conditions in the hold, are you not, sir? A. Yes. Gang foremen check them.

THE COURT: You didn't go down into the hold?

THE WITNESS: I beg your pardon, sir?

THE COURT: You did not go down into the hold?

THE WITNESS: No.

Q. (By Mr. Harmon) You just looked down from the deck level? A. Yes.

Q. It is the gang foreman's responsibility to check [310] the working conditions carefully before he sends men in to work on top of cargo that's already been there to be certain it's safe for the men to walk about, is it not, sir? A. Yes, they normally do that.

Q. All right, sir. Have you ever given instructions to your gang foremen that they are not to pick up a single piece of paper ten feet long and about three or four feet wide that may be laying on top of cartons of cargo— A. No.

Q. —to look under it to see if there might be a separation of some kind into which a man's foot might slip? A. Well, I never gave it a thought. I didn't see the paper.

Q. I see. Well, if you were going to have men carrying a hundred pound bag of bricks and if they're going to be

walking on top of palletized cartons, cargo, and if there's one piece of paper laying down there that's a piece of white paper about four feet wide and ten feet long, wouldn't it be good judgment for the men or for the gang foreman to say, "Pick up that piece of paper and get it out of here. Let's be sure [311] that it's not covered over something where somebody might trip"? A. I couldn't answer for a gang foreman.

Q. Wouldn't you think it good prudence to say, "Pick up that paper"? A. It might be. It might be, depending on what it was.

Q. Well, it would, as a matter of fact, would it not, sir? A. Well, I suppose it would, yes.

Q. If that's the only piece of paper down there and you know you have cartons where there might be some separation between them, to be sure there's no separation under that paper? Wouldn't you think it would be good judgment to say, "Let's pick that thing up and get it out of here and put our own separation paper down"? A. It probably would.

Q. All right, sir. Now, you had some communications with this vessel by cable, I believe your file reflects, did you not, sir? A. I didn't. The office did.

Q. Well, the office? A. Right.

Q. Because, apparently, there was some question [312] raised as to why it was they couldn't load a certain heavy lift in No. 3 hatch? A. I don't recall it at the time.

Q. I have here a cable that says here—it's presumably from your office—saying this is Central Gulf Steamship Corporation of Houston. This is July 1st of '69. It says: Please send the following message to the Master of the 'Karina' German motor vessel: Understand cannot load in No. 3 lower hold. Please advise reason soonest. Central Ship Houston.

So you do communicate with masters of vessels—your office does? A. Oh, yes.

Q. Does it not, sir? A. Yes.

. . .

[313] Q. (By Mr. Harmon) Well, I might ask you, do you know of your own knowledge, sir, whether or not foreign vessels with which you dealt in your experience, whether or not the seamen, while the vessels are at sea, may on occasion go down into the cargo spaces?

MR. SMITH: I object, your Honor.

THE COURT: I'll overrule that objection. If he knows.

Q. (By Mr. Harmon) Do you know of your own knowledge whether or not they sometimes do that when they are at sea? A. No. They don't normally go into the cargo spaces except if the ship might be in danger in heavy seas or something. If they had reason to believe some cargo had broken loose, they might go down there. But that would be the only thing they'd go for.

Q. Then you of your own knowledge do not know whether anybody of the ship's crew went into the cargo spaces or not between the time the ship left Mobile and the time it got to Houston? [314] A. I don't have any idea.

Q. The only people who could answer that question would be the crew of the vessel? A. Right.

Q. The only people who would know whether anyone went down into the No. 1 hold of a vessel while the ship was in the New Orleans would be the New Orleans Stevedore, would it not, sir? A. That's right.

Q. You again don't know that of your own knowledge? A. No.

MR. HARMON: I believe that's all.

THE COURT: Any other questions from this witness?

MR. BROCK: I have one or two, if I may.

THE COURT: All right, Mr. Brock.

CROSS EXAMINATION

By Mr. Brock:

Q. As a matter of practice, is it the ship who decides — in other words, the first mate — who decides whether or not cargo should be secured [315] or not when only a portion of the hatch is loaded? A. Yes, sir. If the mate thinks it should be secured, he will have the stevedore do it.

Q. And then that is something that the stevedore bills the ship for? A. Right.

Q. I happen to have a book here entitled, "Modern Ship Stowage," by Joseph Limming of the U. S. Department of Commerce. Are you acquainted with that book? A. Yes.

Q. Is that recognized as an authority on ship's stowage? A. I don't know that it's recognized as an authority.

Q. Would you agree —

MR. SMITH: Your Honor, then, I object to him being cross examined with it if he doesn't recognize it.

THE COURT: He doesn't recognize the book. Have you ever read the book?

THE WITNESS: Yes. I've seen the book, but I don't know that it's generally recognized.

THE COURT: All right. You've [316] read the book?

THE WITNESS: Yes.

THE COURT: Okay, fine. Go ahead. I'll overrule the objection.

Q. (By Mr. Brock) Now, let me ask you, if there is

space left in the No. 1 hatch, as there was when it came into Houston, will you agree that the cargo should be thoroughly stored or secured so that it cannot move under any probable circumstances? A. You are talking about these skids of Clay?

Q. Right. A. I don't think they needed to be secured, not from here to Mobile or Mobile to here — or, actually, New Orleans to here.

Q. Do you agree with this author's statement that says: If there is space left, the cargo should be thoroughly shored or secured so that it cannot move under any probable circumstances? A. What kind of cargo?

Q. This is just a statement that the author makes. A. That's kind of a generalization. Some cargoes, sure. If it was drums, they should have been secured.

Q. Your position is that whether or not it should [317] have been secured depends on the kind of cargo? A. Right.

Q. And if anyone believes that this cargo could have shifted, then it should have been secured? A. Right.

MR. BROCK: That's all.

. . .

MR. SMITH: Your Honor, at this time the Defendant, Third Party Plaintiff [318] rests.

THE COURT: All right.

MR. HARMON: Judge, at this time I would like to make a motion for judgment that the third party complaint against the stevedoring company be dismissed on the grounds that the evidence wholly fails to show that there is any cause of action against Cooper Stevedoring Company in favor of the ship owner.

The evidence is just wholly insufficient.

THE COURT: What about the piece of paper?

MR. HARMON: There's just no evidence that our people put the paper there.

THE COURT: Well, who would have put it?

MR. HARMON: He represents the ship.

THE COURT: I know.

MR. HARMON: He hasn't called a single witness from the ship to testify the ship didn't put it there.

[319] THE COURT: Whose responsibility — am I not correct that the ship has a nondelegable duty —

MR. HARMON: Yes, that's right.

THE COURT: — to provide a safe place to work?

MR. HARMON: That's correct.

THE COURT: And is it the ship's legal obligation to see that cargo is properly stowed?

MR. HARMON: Yes, sir.

THE COURT: Is it?

MR. SMITH: Well, we get hung if the stevedore creates a condition, an unseaworthy condition.

THE COURT: That's what I mean.

MR. SMITH: Yes. The ship vicariously is liable.

MR. HARMON: That's what I say, you have a legal obligation to determine, after the stevedore is through, that the cargo is properly stowed, do you not?

MR. SMITH: I don't think there are any cases that say the ship is [320] under an obligation to go down there and inspect to make sure the stevedore has properly stowed.

THE COURT: You have a legal obligation whether you have a duty to inspect or not. If the stevedore doesn't stow it properly, then you have the legal liability, do you not?

MR. SMITH: Yes, sir.

THE COURT: All right.

MR. SMITH: And in *Hebert* it was passed right back to the stevedore.

THE COURT: Where does that leave you between yourselves on contribution or indemnity?

MR. SMITH: Well, under the *Hebert* authority I would be entitled to contribution or indemnity if they created the spikes.

THE COURT: Looks like to me that the evidence up to now leads to the conclusion that there was an unsafe condition for them to work in that there was a space left in the cargo through which a man could step.

[321] MR. SMITH: Right.

THE COURT: All right. No question but what that is my — also, that that space was hidden from view.

Now, I think Mr. Harmon, although there is no evidence of it, that a reasonable speculation under the *Lavender v. Kern* test, Federal test, is that that piece of paper was put there by the stevedores because the ship, under the evidence and under what I have heard before in this Court, never does really go down and inspect the stowed cargo — I say “never” — but, normally, they do not. They may either send a seaman or first mate or whatever, down into the hold and inspect the cargo that's already been inspected by the stevedore.

So it's concluded if a piece of paper as the paper that was described here — and that's the only evidence that there was — was there, your people laid it there because the evidence is inescapable from the cargo plan that [322] the only cargo in this hold when the ship got to Houston was put on in Mobile and it came to Houston and it was there. And nothing happened to it because the first people that worked on this ship — and I didn't know this until the last witness testified — didn't even start till 10:00 o'clock. This crew was the first crew on the ship. I was thinking maybe some other work had been done before but, no, this was the first work done on this ship, was at 10:00 o'clock.

MR. HARMON: Judge, I think, though, that where the ship owner has failed to come forward and offer the vessel's logs, has failed to offer a single witness —

THE COURT: What would the log show if he offered it?

MR. HARMON: I don't know, Judge.

THE COURT: What could it possibly show?

MR. HARMON: It could show whether or not they had done any work or [323] any maintenance work in the No. 1 hatch.

THE COURT: Well, wouldn't that be just as much your obligation to subpoena that log as it would be theirs to bring it?

MR. HARMON: No, sir. I think under the Maritime Law, and this is a Maritime case, where they fail to produce witnesses, it is their burden to produce their logs and not my burden to go and say, "Get them out here and let me see them."

THE COURT: My present inclination in this case is to make you equally at fault and to share this loss 50-50. That's my present inclination.

MR. SMITH: I think it's fair. There's burden on the ship because they created the condition and covered it up. The Houston Longshoremen didn't see it. So even if the mate had gone down there to inspect the cargo —

THE COURT: That is my present inclination.

MR. HARMON: I would like to just [324] like to make my motion in the record because under the federal rules I have to make my motion if I want to be able to complain.

THE COURT: Right, and I will overrule it.

MR. HARMON: All right. And I will ask Mr. Dixie Smith to be my first witness and I will waive the oath.

THE COURT: I'll waive the oath.

MR. SMITH: Can I object.

[325]

DIXIE SMITH

called as a witness by the Third Party Defendant, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Harmon:

Q. Mr. Smith, is it not a fact that the party that you are actually representing here is the liability underwriter for Midgulf Stevedores? A. Yes.

Q. And is it not a fact that Midgulf Stevedores has entered into an agreement in writing with the ship owner

to indemnify the ship owner against any recovery which may be had against the ship owner in this case? A. I don't know if it's in writing or not.

Q. Well, that agreement has been made, has it not, sir?

A. There's been an agreement made between the stevedore and the ship.

Q. An agreement has been made between Midgulf Stevedore and the owners of the "Karina", who are the Defendants in this case and the vessel owner, that Midgulf Stevedore has agreed to indemnify the Defendant ship owner in this case [326] against any judgment which may be recovered against the ship owner in this case? A. I believe so, but those dealings were made before I came in the case and I have no personal knowledge as to the exact deal. But I assume so since we assumed the defense of the vessel.

MR. HARMON: All right. Your Honor, I want to renew my motion on the grounds that this is not the vessel owners seeking indemnity against the Mobile Stevedore, but indemnity has already been granted in favor of the vessel by the Houston Stevedore and the Houston Stevedore has no cause of action against the Mobile Stevedore.

MR. SMITH: Your Honor, we assume we took over — dismissed the Houston Stevedore. If he had any case, he could have filed a cross action. There was none.

THE COURT: The only problem that you have, as I see it, Mr. Harmon, with reference to that position is that there has been a dismissal of Midgulf in this case.

[327] MR. HARMON: Right. And all I am saying is the vessel owner has already recovered indemnity

by virtue of the agreement that they had made with Midgulf. The vessel has already been indemnified.

MR. SMITH: No.

THE COURT: But that doesn't have anything to do with the indemnity as between — the legal indemnity between you and the ship, does it?

MR. HARMON: I think it does, Judge, once the ship owner has obtained indemnity which they have obtained by agreement.

THE COURT: Do you have any case that says that?

MR. HARMON: Sir?

THE COURT: Do you have any case that says that?

MR. HARMON: I don't know whether I can show you a case that says it, but, quote, once a party has been indemnified, which they have now been indemnified —

THE COURT: But that is a different [328] indemnity than the one you are talking about here, isn't it?

MR. SMITH: Yes, Judge. In this situation, if the ship owner can pour the Plaintiff out because of the Plaintiff's own contrib, the Houston Stevedore is liable to get stuck with the attorneys' fees for successfully defending the case if we didn't take over. In this case the stevedore took over to save the expense of the attorneys' fees in case they won the case. In case the ship lost it, they figured the stevedore would get stuck either way. We stand in the same shoes as the vessel.

We are defending the vessel just like it's Royston, Rayzor & Cook.

THE COURT: I don't really understand. I'll be perfectly honest about it, I really do not fully understand Mr. Harmon's position on this particular matter.

MR. HARMON: All right. My position is that once the vessel owner has obtained indemnity, which they have [329] obtained from —

THE COURT: Well, do you classify that as some sort of a waiver of seeking indemnity from you?

MR. HARMON: Yes, sir. Say once the ship owner has obtained indemnity, he no longer is damaged. He therefore no longer has a cause of action against the Mobile Stevedore. He has been fully indemnified by the Houston Stevedore.

THE COURT: Well, he's not indemnified in this respect, if the Court finds that the ship — that there was, through the cargo stowage, an unsafe place to work.

MR. HARMON: Right.

THE COURT: Then the ship still has a liability.

MR. HARMON: . . . which the Houston Stevedore has already—

THE COURT: That doesn't have anything to do with the Houston Stevedore. If that stowage of cargo was brought about by the stevedore other than the Houston Stevedore, which is in this case, [330] the ship would still be liable for the full amount to whatever Mr. Sessions were to recover here—

MR. HARMON: Right.

THE COURT: —if his injuries were a result of that unsafe condition.

MR. HARMON: Right.

THE COURT: If the Court were to find that, irrespective of the indemnity that he has with Midgulf, he would still be responsible, legally responsible, to pay the damage that the Court were to assess. Right?

MR. HARMON: That's right, but—

THE COURT: Okay. So his indemnity agreement with Midgulf doesn't have anything to do with that.

MR. HARMON: Judge, it has to do with his right to try to assert a cause of action against me.

THE COURT: I don't think it does because in this particular situation we have another cause of action separate and apart from a cause of action relating to Midgulf, and that is a cause of [331] action against another stevedoring company in another port for doing something that Midgulf has nothing to do with and is not related in any way to the indemnity agreement and the ship. This is a separate and distinct cause of action by the ship, not Midgulf, against you.

MR. HARMON: All right. But once he obtains full indemnity, and he has now obtained that—

THE COURT: But it's not the same indemnity.

MR. HARMON: It doesn't make any difference, Judge. He has obtained full indemnification.

I want to urge, as a Motion for Dismissal, this additional ground as well.

THE COURT: I'll let you urge it. I haven't read any such case that announces this legal proposition that you are now advancing.

MR. HARMON: I understand. All right.

[332] THE COURT: And I don't much see how they could.

MR. HARMON: All right.

THE COURT: Because the cause of action as between you and the ship has nothing to do with the cause of action against Midgulf asserted by Mr. Sessions and the ship. Midgulf and the ship have one cause of action against them. Then over and against you the ship is raising an indemnity—

MR. HARMON: Right.

THE COURT: —because they are claiming that you created this cargo stowage that resulted in an unsafe place to work. Right?

MR. HARMON: Right.

THE COURT: So I don't see how their indemnity with Midgulf is any sort of a waiver of their indemnity against you.

MR. HARMON: Well—

THE COURT: Because, actually, under my view of it and under my view of this case insofar as the facts are concerned, [333] I don't see that Midgulf has any liability whatsoever in this case. I don't know that Midgulf did anything.

MR. HARMON: Judge, according to what their superintendent testified, to go down there and to have a piece of paper down there over cargo—

THE COURT: You're trying to say that they are liable because the walking foreman did not order that piece of paper removed?

MR. HARMON: That's right, and didn't go and inspect for it because, as their own ship's superintendent —

THE COURT: To me, you are putting a responsibility on the part of that stevedoring company and that longshoreman gang and the stevedoring company. That is a rather harsh rule because I don't see how they would have any way of knowing — true, in this case it's a piece of paper, but it could have been something else that could have some utility. You understand? And maybe the piece of paper had some utility. [334] I can't really just frankly see it right now.

But to ask them to check something that they see down there that's not wadded up, it doesn't look like trash — at least the testimony is that it was laid out in a ten-foot long section three to four feet wide, so that the conclusion would reasonable be that it had some utility, some reason for being there — and to charge them with the responsibility of determining what that reason is, to me it would seem like to be —

MR. HARMON: Of course, their own superintendent testified that he would have thought it would have been the good judgment of a proper practice for the gang foreman to have picked it up because of the nature of the cargo it was on where you might reasonably find, expect to find, some cracks. And his own testimony was that he thought that it should have been picked up, probably should have been picked up to [335] check to see that it wasn't covering up over something.

THE COURT: Might have been hiding a snake. Lift it up, a snake comes up. Pew.

MR. HARMON: Right. You don't know there are going to be snakes on this cargo, but you do know there is apt to be some separation.

THE COURT: Right. That's a facetious remark. Well, you got me thinking, anyway. I just don't know that they have that type of responsibility. Maybe they do.

MR. SMITH: Your Honor, I've briefed that and tried it to Judge Noel recently and he's handed a very good seventeen-page opinion on the stevedore's duty to inspect, and I think it will fall right in here. I've got my pretrial brief in the other case and I will send you a copy of Judge Noel's very learned and esoteric opinion of this.

[336] THE COURT: He must have held in your favor for you to say that, Mr. Smith.

MR. SMITH: Yes, sir. It exonerated the poor stevedore.

THE COURT: I could tell immediately it was in your favor. No question about that.

MR. SMITH: But, I mean, it's a very good coverage on the legal duty of the stevedore to inspect these traps they set for us and I think it will show in this case that Midgulf didn't do anything wrong.

THE COURT: Well, I think for Mr. Harmon to be correct in his legal view, I think the evidence would have to show, and I'm sure — I see his contention now in this case — you would have to find as a fact some negligent act or failure to act on the part of the Houston Stevedore. Right?

MR. HARMON: Right.

THE COURT: What if there had not been any paper there at all?

[337] MR. HARMON: Well, if there hadn't been —

THE COURT: If there had not been any paper there at all, then your position on this indemnity would not be tenable, would it?

MR. HARMON: Oh, sure, Judge, because if there hadn't been any paper at all, the hole is going to be perfectly — or whatever opening or separation there is — is going to be perfectly open and obvious.

THE COURT: I don't think you could find that in this case. I don't think a trier of the facts could come to the conclusion that the crack in the hold of a ship among boxes of crates, of bricks, stowed in Mobile, that you could draw the conclusion that that opening would be open and obvious. I really don't. Maybe so, but it's really not even like that old San Jacinto Building Company case out in Beaumont, the step-up into the back.

MR. HARMON: Of course, here, [338] when they're all saying that they realize you can't have separation between them, here they say after the accident happened they see it's — what? Is it a foot wide — not — the width of a man's foot wide, wide enough where they say they had to put two pieces of board down on top of it.

THE COURT: Said six to seven.

MR. HARMON: Something like that.

THE COURT: And the length of a crate.

MR. HARMON: Right. Now, certainly in good light, which they've all testified there was—

THE COURT: No bad light.

MR. HARMON: —the length of these crates which we're going to show here shortly—I don't know if anybody's gotten into it yet; we're going to show the kind of crates—certainly it was a condition that if anybody looked around at it, was going to see.

THE COURT: I'll overrule your motion at this time. Of course, if you [339] present any evidence that causes me to change my mind, you can always reurge it.

MR. HARMON: All right, sir. I'd like to call Mr. Cooper.

THE COURT: All right.

[340] ERVIN S. COOPER,

called as a witness by the third party defendant and, having been first duly sworn, was examined and testified upon his oath as follows:

DIRECT EXAMINATION

By Mr. Harmon:

Q. Mr. Cooper, you have already been sworn, have you not, sir? A. Yes, sir.

Q. Would you state your full name, please, sir? A. Ervin S. Cooper. E-r-v-i-n S. Cooper.

Q. Now, Mr. Cooper, where do you live? A. In Mobile, Alabama.

Q. And are you the president of Cooper Stevedoring Company? A. That is correct.

Q. And is that company just owned by you? Is it your family-owned company? A. Me and my sons.

Q. All right, sir. How long have you been in the stevedoring business in Mobile? A. Since 1939.

Q. Now, did your company in 1969 have a stevedoring

contract to load the ships for Alcoa? [341] A. Correct. We did.

Q. And your company did do the loading of this ship, the "Karina," that we've been having all of this testimony about? A. That's right.

Q. Now, is there a great deal of this firebrick and furnace lining and that type of equipment which is shipped through the Port of Mobile? A. It's quite an important movement through Mobile.

Q. All right. And how long, prior to 1969, had your company been acting as stevedores for Alcoa on their ships, this ship being on a charter to them? A. Since 1938.

Q. And during that time had you handled firebrick and furnace lining and this type of general cargo for them? A. On a regular basis.

Q. This vessel, I think, brought bauxite and bulk into Mobile, did she not, sir? A. That's correct.

Q. And after being unloaded of the bauxite did your company handle the discharge of the bauxite? A. We did not.

Q. That is done as a bulk operation at Alcoa's [342] plant? A. That's right.

Q. And the ship was sent over to load cargo and your company was advised of what cargo to load? A. That is right.

Q. Now, Mr. Cooper, I'll hand you three documents which are, I think, dock receipts of Alcoa Steamship Company and which you see descriptions of various types of cargo, among which are shown here nineteen pallets furnace lining and opposite that in pencil is written 35x37x48¾. Do those pencil figures represent the physical dimensions of that size of pallet? A. That's the dimensions in inches.

Q. In inches.

THE COURT: What are the dimensions?

THE WITNESS: Dimensions in inches.

THE COURT: I say, what were they?

THE WITNESS: 35x37x48 $\frac{3}{4}$.

THE COURT: Thirty-five inches, what is that?

THE WITNESS: That would be thirty-five inches wide. I tell you frankly, [343] I can't say exactly.

THE COURT: What are the dimensions? Give me the dimensions.

THE WITNESS: 35x37x48 $\frac{3}{4}$.

MR. HARMON: Judge, it's thirty-five inches high, thirty-seven inches and forty-eight and three-quarter inches in length.

THE COURT: Thirty-five inches wide, thirty-seven inches — I mean, thirty-five inches high, thirty-seven inches wide and forty-eight and three-quarters inches long, right?

MR. HARMON: Yes, sir.

THE COURT: Is that what your're saying?

MR. HARMON: Yes, sir.

THE COURT: All right.

Q. (By Mr. Harmon) You see the same description down here opposite other portions of cargo, such as barrels and boxes? Here is six pallets of firebrick. You see this one, sir? A. Yes, sir.

Q. And it shows that it is ten and three-quarters? A. No. Here.

[344] Q. I'm sorry. A. Here are the dimensions.

Q. Yes. It's twenty-one by thirty-six and a half by Forty-eight and a quarter and twenty-five by thirty-six and a half by forty-eight and a half! A. That's right.

THE COURT: Does the cargo plan show which part of this was stowed in the port side in the wing where he claims he fell?

THE WITNESS: No, judge. All we can show is what was loaded in the after end of No. 1.

THE COURT: I see. You can't show where it was stowed in the after end?

MR. HARMON: No. It was just stowed all the way across, as they have testified.

THE COURT: So these boxes were of irregular size and shape bearing from twenty-one inches high to thirty-five, is that what you're saying?

MR. HARMON: Yes, sir. As I say, most of them, judge — as I say, there [345] were nineteen here that would have been one size.

THE COURT: What size are nineteen of them?

MR. HARMON: Nineteen were this thirty-five by thirty-seven by forty-eight and three-quarters.

THE COURT: What are the others?

MR. HARMON: There were three of them that were twenty-one by thirty-six and a half by forty-eight and a quarter and three of them were twenty-five by thirty-six and a half by forty-eight and a half.

THE COURT: How many? Twenty-five of them?

MR. HARMON: No.

THE WITNESS: Three.

MR. HARMON: Three.

THE COURT: Three were twenty-one by thirty-six and a half by forty-eight?

MR. HARMON: Yes, and three others were twenty-five by thirty-six and a half by forty-eight and a half. [346] Let's see. There were twenty-seven of them that were thirty-five by thirty-seven by forty-eight and three-quarters.

THE COURT: Well, now, that makes — twenty-seven, that makes —

MR. HARMON: Now, wait a minute. Of that amount, of this last amount I gave you, that twenty-seven that were of that description, only fourteen of them — I mean only thirteen of them were loaded in No. 1 lower hold.

THE COURT: Well, so, that makes thirty-two of them, then, instead of nineteen. There were thirty-two of them thirty-five, thirty-seven and forty-eight and three-quarters.

MR. HARMON: No.

THE WITNESS: That's right.

THE COURT: Three of them were twenty-five by thirty-six and a half by forty-eight and a half.

MR. HARMON: All right. And there were thirty of them that were thirty-five by thirty-seven by —

[347] THE COURT: That makes sixty-two, then?

MR. HARMON: Yes.

THE COURT: Were there sixty-eight boxes in all?

MR. HARMON: Let's see. There's thirty and thirteen is forty-three and twenty-three — I'm sorry — and nineteen is — what? — is sixty-two, and six is sixty-eight.

THE COURT: Sixty-eight boxes. Sixty-eight boxes?

MR. HARMON: Sixty-eight pallets, rather, judge.

THE COURT: There was one box of pallet — I mean, one crate to a pallet?

MR. HARMON: That's correct. They're actually not crates. That's what I'm going to get into next. At least some of them aren't crates.

THE COURT: Okay.

Q. (By Mr. Harmon) Mr. Cooper, did you have occasion to, after you were brought into this lawsuit, to make some photographs? And, particularly, [348] I'll show you a photograph which is marked on the back here as No. 11. A. Yes. I was present when it was made.

Q. All right, sir. You identified this package as being a package of furnace lining that was shipped by the A. P. Green Company? A. That's right.

Q. They are the same people who had packaged the pallets that were in this Alcoa shipping list which your company loaded on the "Karina" on the 28th of June, 1969? A. That's correct.

Q. And the way in which — this is not the actual package from this ship, but it was which was made subsequently. It shows on the side here this is —

MR. SMITH: Your Honor, I'm going to object to this testimony by Mr. Harmon. That is just grossly leading.

Q. (By Mr. Harmon) Well, can you read what it says here on the side of this picture marked No. 11? A. Thirty hundred-pound bags.

Q. All right. Below that it has the letters here, K.S. 4? A. That's correct.

[349] Q. All right, sir. Now, did you and I go up, in January of this year, go up to the A. P. Green Company and ask them to show us how their various commodities were packaged? A. We did.

Q. And at that time, did they allow us to take these pictures here which are marked 1, 5, 3, 2, 4 and 6? A. They did.

Q. That's these colored photographs? A. That's correct.

Q. At that time, Mr. Green, did they have any of their packagings which contained these bags of furnace liner as distinguished from bricks? A. They did not.

Q. All right. The only ones that they had to show to us, because it was in their process, were the ones that were shown in these photographs that we took color pictures of, is that not correct, sir? A. That's correct.

Q. And each package contained brick as distinguished from bags? Is that correct, sir? A. That's correct.

Q. Now, this photograph which has been marked as [350] No. 10 here, did you determine who crated that? You were present when the picture was taken. A. I was present when it was taken. That was crated by Alabama State Docks.

Q. You notice it has the wooden slats over the top of the docks? A. Yes.

Q. None of the A. P. Green Company's packaging had any wood on the top of the boxes? A. No, they did not.

MR. HARMON: There was one picture that Mr. Sessions identified.

THE COURT: He identified this one, No. 10. That's the one Mr. Sessions identified.

MR. HARMON: Right. All right.

MR. SMITH: Mr. Thomas identified No. 3.

THE COURT: Right.

Q. (By Mr. Harmon) Now, at the time we were up there did we obtain a specimen of the type of corrugated material, paper or light cardboard, whatever you want to call it, that was used by them in their packaging? A. We did.

[351] Q. And is this that piece of paper? A. That is that piece of paper.

Q. You notice that it is corrugated and it is brown? A. Yes.

Q. Now, you observed this picture, which is marked No. 11, which is an A. P. Green crating of the bagged material of furnace lining. This was taken on the docks in Mobile, correct, sir? A. That's right.

Q. So this would be the way that such a carton would look after it had been shipped by railcar from A. P. Green Company down to Mobile?

MR. SMITH: Your Honor, I object. It's his testimony —

THE COURT: I sustain that objection.

Q. (By Mr. Harmon) Well, where is the A. P. Green Company located? A. Mexico, Missouri.

Q. Do you know how they get their crates of steel of this character down to the docks in Mobile? A. By railcar.

Q. Where was this picture taken, No. 11? A. Mobile, Alabama State Docks.

Q. All right, sir. Would you state again what it [352] contains? I think you already stated what it contains.

A. It contains bags of furnace lining.

Q. Bags of furnace lining. Could you describe what that material would be like? That is, when you say a bag, is it like a bag of cement or a bag of sand or something like that? A. It's similar to cement. It's what they make mortar out of.

Q. All right, sir. A. And it's used to line the furnace with.

Q. Now, I'm trying to find something here. Have you brought here with you the records of your company showing the work which your company did in loading this cargo on this vessel? A. I did.

Q. And is this your entire file on the — A. It's the entire billing file.

Q. All right, sir. And —

MR. SMITH: Your Honor, he said billing file as this is distinguished from other files. I'd like to know if there are any other records.

THE WITNESS: I know of no other file.

[353] MR. HARMON: We'd like to ask that this be marked as our next exhibit. I think all of the counsel have had an opportunity to see it.

MR. SMITH: I haven't looked at it carefully, your Honor.

THE COURT: It is exhibit what?

THE CLERK: 3.

MR. HARMON: It's just Cooper Stevedoring Company's file, Exhibit No. 3.

Q. (By Mr. Harmon) Mr. Cooper, was your company requested to make any special arrangements for the purpose of preparing this cargo to have other cargo loaded on

top of it at some subsequent port? A. We were not.

Q. Did you have any information as to even what was going to be done, whether other cargo was going to be loaded on top of this cargo or not? A. No, sir.

Q. How is this cargo loaded aboard a vessel? A. It was loaded aboard the vessel by putting straps underneath it and hoisting the board and putting the lift truck in the hold and putting it in [354] place.

Q. All right. In other words, it's so heavy that men by themselves can't move it; it's got to be maneuvered into place by a lift truck? A. That's right.

Q. Because of the type of cargo, it is possible to go and to put pallets of this type of cargo up so close together that there will be absolutely no space in between them? A. Impossible.

Q. Why is that, sir? A. Because of the shape, the bulging shapes.

Q. All right, sir. Now, did your company make any charge to Alcoa or to the shipowner for any dunnage or separation paper? A. Did not.

Q. If your company had put down any dunnage or chocking or separation paper, would a separate charge have been made for that in your record? A. If we had put down separation paper for a subsequent port or if separation paper had been required for the type of cargo we were loading, there would have been no charge. There's no separation paper required in loading brick.

Q. All right. Now — [355] A. Nor is there any dunnage required.

Q. What is the situation, when your company is doing a loading for Alcoa, when separation paper is required, as to who furnishes the separation paper? A. Alcoa furnishes it.

Q. Alcoa furnishes it. Let me show you this file —

MR. SMITH: Whose file are you referring to?

MR. HARMON: I'm referring now to — I guess it's Midgulf or Central Gulf's file.

MR. SMITH: Well, your Honor, I'm going to object to him testifying to anything about Midgulf's records.

THE COURT: They're not in evidence.

MR. SMITH: They're not.

MR. HARMON: Well, their record is here and was left for me to look at it.

THE COURT: Well —

MR. HARMON: I would like to offer it in evidence.

MR. SMITH: Mr. Jukes was here.

[356] THE COURT: How are you going to cross-examine this witness about something that is in their file?

MR. HARMON: I'm not cross-examining. This is direct.

THE COURT: I mean, examine him.

MR. HARMON: I simply want to know how the stevedore files were kept.

THE COURT: He wouldn't know. You should have done that though Mr. Jukes.

MR. HARMON: All right. May I just offer this in evidence, this file?

MR. SMITH: No. I object to it. It was my file and I gave it to him for use in cross-examining Mr. Jukes

if he wanted to, if there's anything in it, and he has had an opportunity to and he's not to go through here and just pick my file apart and introduce at random pieces out of it that might come out of context, may look favorable. He had the opportunity to use the whole thing.

THE COURT: I don't quite understand [357] your point, Mr. Smith. If he wants to introduce it in evidence, I guess he can.

MR. SMITH: No, not necessarily.

THE COURT: Why can't he? What is to prevent him?

MR. SMITH: It's hearsay.

THE COURT: Hearsay to you? It's not hearsay to you. It's your file.

MR. SMITH: I know it's my file. I've got some control over what he does. I don't go introducing his file.

THE COURT: Not if you've given it to him.

MR. SMITH: I let him look at it to cross examine Mr. Jukes. There's nothing in there that we're trying to hide. It just doesn't belong in evidence. What Midgulf did with Alcoa is entirely different and has no bearing on what —

THE COURT: If you want to make some objection to that, it might be good, but I can't see why, if Mr. Harmon wants to take some part of your file that [358] was tendered to him to look at, and introduce it into evidence. I for the life of me can't understand why he can't do it.

MR. SMITH: Well, I don't want him to.

THE COURT: I understand you don't want him to.

MR. SMITH: And, too, it has no relevance as to what Mr. Cooper's stevedores —

THE COURT: He's not asking Mr. Cooper anything about it. He just wants to introduce it into evidence. Let me see what it is.

MR. SMITH: It's hearsay.

THE COURT: It can't be hearsay. It's impossible to be hearsay since it's your file.

MR. SMITH: My file is hearsay just like anybody else's unless it's proven up.

THE COURT: Hearsay as to who? It's not hearsay as to you.

MR. OLDHAM: Your Honor, if he [359] wants to infer a stevedore practice from our records, he should use the Cooper Stevedore records to infer that practice.

THE COURT: I don't know. I haven't seen what purpose Mr. Harmon — but what Mr. Smith is saying doesn't make any sense. Just per se, if Mr. Harmon wants to introduce it into evidence, it certainly isn't hearsay as to Mr. Smith. It's his file. Now, let me see what it is that you want to introduce and I'll ask you why you want to introduce it.

MR. HARMON: All right. Just the bottom part of this billing here on the bottom of this page, and then there are two attached bills over here which are obviously referred to underneath, this one right here and that one right there. What it has to do, it just

simply shows that so many rolls of kraft paper were supplied and so many board feet of dunnage lumber were supplied for use on this vessel by Midgulf and Midgulf [360] apparently billed somebody for it.

THE COURT: Well, I'll sustain objections to introducing that into evidence —

MR. SMITH: Thank you, Judge.

THE COURT: — because it's meaningless. It's irrelevant and immaterial in the manner in which it is here. If you wanted to ask somebody from Midgulf what it was, what it meant, why they billed it to them, and on and on, I'd let you do it, but to introduce it into evidence now is of no value to me. I can't interpret it. I don't know what it relates to.

MR. HARMON: Well, could I get copies of those exhibits marked and simply make them as a part of our Bill of Exceptions?

MR. SMITH: Yes.

THE COURT: Yes, you can do that.

MR. HARMON: All right.

Q. (By Mr. Harmon) Mr. Cooper, to your knowledge, has your company ever used any white separation or white paper for separation or dunnage purposes [361] or any other purposes? A. No, sir.

Q. You have your stevedore superintendent here who was in charge of loading this vessel? A. Yes, sir.

MR. HARMON: I think that's all the questions I have of Mr. Cooper.

MR. SMITH: My I proceed, your Honor?

THE COURT: Yes, sir.

CROSS EXAMINATION

By Mr. Smith:

Q. Mr. Cooper, I gather you did ~~not~~ go down on the vessel in the end of June when your company loaded these skids of bricks and inspect this particular sixty-eight skids of bricks that were put in and furnace liner in the No. 1 hatch? A. No, I did not.

Q. You can't really testify what those particular sixty-eight crates looked like on that date? A. I have a good idea from thirty years' experience.

Q. I understand that, Mr. Cooper, but you don't have any personal knowledge, yourself? A. I didn't see the sixty—those—I don't recall [362] seeing those. I might have seen them. I don't know. I don't remember the vessel.

Q. All right. But you can't testify and tell Judge Singleton that you went down there and saw those sixty— A. I cannot. I cannot.

Q. But you admit that longshoremen hired by your company, by using forklifts, I gather, loaded these skids of bricks in the after end of No. 1 hatch? A. I didn't see that, but I presume they did.

Q. Well, your records indicate that? A. Yes, my records indicate that.

Q. And to do this, they bring it in on a ship's winch, put it down in the square of the hatch, the forklift driver picks it up and drives back to the after end of the hatch and puts it down where he wants it? A. That's correct.

Q. And you would agree that it's good stevedoring purpose, or practice, to put these skids as close together as you can get them? A. That is correct.

Q. You wouldn't recommend leaving any gaps or spaces in there if they could put them as close as they [363] could get them, would you? A. No. Sometimes you come out to the end and you don't have any other cargo to go

and you leave a space there unless somebody wants to shore it up.

Q. Well, I understand on the end of it, but I'm talking about in the stow itself as you're coming back laying a tier across the after end of the hatch, it's good stevedoring practice to put the crates as close together as you can? A. That's right.

Q. Get them as tight and snug as you can? A. That's right.

Q. And you admit that you shouldn't leave a six or seven-inch space between crates? A. If it's physically possible. Sometimes you have to leave that much.

Q. Well, if the crates are—nothing wrong with the crates, or— A. Well, they're not perfectly up and down, square.

Q. Well, these photographs that are in evidence that you all—where are they? A. The photographs are not photographs of lining.

Q. Well, just taking the photographs that you and Mr. Harmon went up and took some place, there [364] was nothing to keep longshoremen from stacking these crates much closer than six or seven inches to each other? A. These crates, if they were brick, these crates would stow fairly well before they'd be handled two or three times. This is before loading. This is right in their warehouse before they were even put in the car. Now, they've got to be unloaded, loaded in the car, unloaded from the car, put on the dock, brought alongside the ship. Every time you pick up a crate like that, a band breaks or has some damage on it.

Q. Why didn't you all get us some pictures of what the crates might have looked like in the ship rather than these real fancy pretty ones? A. Because they had no furnace lining being crated that day. We had gone 800 miles up there and we got what we found.

Q. You got some nice pictures of some good crates?

A. That's right.

Q. And these will fit in next to each other very nicely if the forklift operator will put it there right, isn't that right? A. Well, even these have some buldge to them.

Q. Not six, seven inches, though? [365] A. These would work better than if they were furnace lining.

Q. All right. But would you agree with me that if there's nothing wrong with the crates themselves, if they look about like the pictures that you all introduced here today, that the forklift operator who put the crates in and after end of the No. 1 hatch should not have left a six or seven-inch gap between crates if it was possible to put them right close to each other? A. If they were square crates, yes.

Q. So if a forklift operator in Mobile, one of your employees, did leave a space six — five or six or seven inches wide, he shouldn't have done it? A. I can't say that. Maybe he couldn't — it might have been five or six inches wide here and down at the bottom it was just like this (indicating), it was snug.

Q. All right, sir. A. These are not like blocks.

Q. And you testified that your records here don't show any charge for separation paper? A. They do not.

Q. Isn't it possible that before the cargo stowage [366] plan was finalized, that some of your employees might have thought they were going to load something else on top of these crates in the No. 1 hatch? A. No, no.

Q. How can you say that? A. Because. Well, they are prestowed, these ships, two or three days in advance and they know where they're going. You can see when that hatch was worked we worked — we knew we had just a little work in that hatch and we worked in No. 2 till noon and went to No. 1 and did that work, and three hours, and came back to No. 2.

Q. Well, are you saying — A. It's not a hit or miss.

Q. Are you saying that the cargo stowage plan is finalized before they even put any cargo in the ship and it's already determined exactly where every piece of cargo is going to be put before you even start the first piece of cargo? A. Most of the time, it is.

Q. Every bit of it? You never change it? A. Well, you might have a late arrival of a car or something, but that's the whole idea. If you didn't do that, you never would load a ship [367] properly.

Q. We've never put separation paper down in stowing brick or furnace liner in these pallets. There's no need. You put separation paper down to protect the cargo you're loading and you're certainly not trying to protect this cargo with kraft paper.

Q. Well, Mr. Cooper, you have loaded skids of cargo or bricks like this before and then loaded other cargo on top of it, haven't you? A. Oh, I'm sure we have in the past.

Q. All right, sir. Would it be the normal operating procedure, after you loaded the bricks, to put separation paper down before loading another cargo on top? A. If you were going to load the other cargo?

Q. Yes. A. If you were going to load other cargo on top, you would do that.

Q. That's right. So if they thought they were going to load some cargo on top of these sixty-eight pallets of bricks we are talking about, the next thing that your stevedores would have done would be put separation paper down? [368] A. Oh, you—if they thought they were going to do. We know what we're going to do when we go to work. These gangs cost too much. We don't just decide as we go along what we're going to do. We wouldn't stay in the business very long with such poor planning as that.

Q. All right, sir. Going back to your records, you

don't have any charge for any separation paper on this particular day or these two days the ship worked in Mobile?

A. We don't have them. We don't furnish separation paper on Al — Alcoa furnishes their own paper. They always have.

Q. Well, whether it was Alcoa or anybody else, if you furnished separation paper, yourself, would you charge for it? A. If someone asked us to furnish separation paper, it depends on what the contract was. We load full cargoes of flour and the rate might include furnishing the dunnage and paper for out of town. It depends on the contract.

Q. Well, how much would you normally charge for a piece of separation paper ten feet long, or would you make any charge for that one little, old bitty piece? [369] A. Oh, that's a ridiculous question, I think.

Q. Well, yes, sir. It may seem ridiculous, but I'm making a point. A. How much would you charge for a paper napkin?

THE COURT: You're sure wasting a lot of time.

MR. SMITH: Well, Your Honor, my point is that there's no charge made in these records because they wouldn't charge for just a ten-foot piece of paper if they put it down.

Q. (By Mr. Smith) Isn't that true, Mr. Cooper? A. You're assuming we put down —

Q. Just assume if your stevedores, one of your longshoremen or several of your longshoremen put this ten foot piece of paper on top of the cargo, that's been testified, if your people did it, isn't it true that you wouldn't make a charge and you wouldn't have any record of it? Isn't that true? A. You say if — you're assuming that they did it.

Q. Yes. You can assume. This is a hypothetical question.
A. I don't — if you dropped a piece of newspaper down there, I don't think you would make a charge [370] for it, either.

MR. SMITH: All right. I pass the witness, Your Honor.

THE COURT: All right. Any further questions?

MR. BROCK: I don't have any questions of Mr. Cooper.

THE COURT: This was brick, firebrick and—

MR. BROCK: Furnace liner.

THE WITNESS: They call it furnace lining. Only six of the crates, six of the sixty-eight, were firebrick. The rest of them were furnace lining.

THE COURT: I guess firebrick and—

THE WITNESS: Sixty-two.

THE COURT: Sixty-two furnace lining?

MR. HARMON: Furnace lining, bags of furnace lining, which is shown in that picture No. 11.

MR. BROCK: This picture No. 10—

THE COURT: Wait a minute. On this furnace liner I believe you described [371] it as similar to cement?

THE WITNESS: Well, it's a little more bulky than cement, but it's—the bag is not as flat as cement, I'll say that. It's probably one and a half times bulkier than cement, but it's—

THE COURT: Similar to cement but more bulky?

THE WITNESS: Yes.

MR. HARMON: There's only one last thing I have that I want to do and that is this:

REDIRECT EXAMINATION

By Mr. Harmon:

Q. Are these the loading cards which were obtained from the A. P. Green Company showing what they shipped on these different railcars? A. That's correct.

Q. And they tie in with Alcoa's records, I think, do they not, about what was received? A. That's correct.

MR. HARMON: We would like to ask that these be marked as exhibits, also, Your Honor, because they identify [372] as a hundred such quantity a hundred pound bags as KS-4, which is the same marking that you see on this bag, KS-4 on this photograph which we have over here.

THE COURT: Okay. I saw it, No. 11.

MR. HARMON: That's all I have.

CROSS EXAMINATION

By Mr. Brock:

Q. Now, this photograph No. 10 was the furnace lining, wasn't it? A. No. The —

THE COURT: 11 is the furnace lining, according to what he's saying.

THE WITNESS: This is the furnace lining. That's the crate of brick. That's a brick crate by Alabama State Docks. Can't you see? You can see the brick in there.

MR. BROCK: All right. I have no other question.

THE COURT: All right.

MR. HARMON: That's all.

[373] THE COURT: Anybody have anything else?

MR. HARMON: I have my stevedore superintendent, Your Honor.

THE COURT: You want to put him on?

MR. HARMON: All right.

THE COURT: Okay. You want to put him on today?

MR. HARMON: Yes, sir. I don't think it will take very long.

THE COURT: All right.

MR. HARMON: Mr. Bru.

[374] WILLIAM V. BRU,

called as a witness by the Third Party Defendant and, having been first duly sworn, was examined and testified upon his oath as follows:

DIRECT EXAMINATION

By Mr. Harmon:

Q. Would you state your full name, please, sir? A. William V. Bru.

Q. Mr. Bru, are you employed by Cooper Stevedoring Company, Mobile, Alabama? A. Yes, sir.

Q. How long have you been involved in the — how long have you worked for Cooper Stevedoring Company? A. Since 1966, '65.

Q. All right, sir. You have had occasion to see the records

of Cooper Stevedoring Company on the loading of the vessel, "Karina"? A. Yes, sir.

Q. And were you the stevedore superintendent for Cooper Stevedoring Company on that job? A. Yes, sir.

Q. And during the course of that job, did you have occasion to observe the loading of the cargo? [375] A. Quite frequently.

Q. All right, sir. And you don't make it a practice to go down in the holds, yourself, do you, sir? A. No, sir.

Q. After the cargo has been completely loaded, what do you then do insofar as checking with the vessel to see whether or not they're satisfied about the stow? A. We check with the chief officer.

Q. All right. Now, do you ask him to go with you on the hatches which your men have worked to check the stow of the cargo and see if he is satisfied or has any changes that he wants to make? A. Yes, sir, I think so, as far as I remember.

Q. All right, sir. Br. Bru, have you previously been employed by Alcoa Steamship Company? A. Yes, sir.

Q. In Mobile? A. In Mobile.

Q. All right. Will you state to the Court whether or not, in the loading of this furnace liner, this palletized furnace liner — and you've seen these photographs and you've seen the records and you know the kind of cargo we are talking about, sir? [376] A. Yes, sir.

Q. — was there any occasion or any need for, or was there, to your knowledge, any separation paper placed down by the Cooper Stevedoring Company employees on top of these cartons of furnace lining that was put in No. 1 hold — A. No, sir.

Q. — on this vessel? A. No, sir.

Q. All right. There have been occasions in loading cargoes, I'm sure, when Cooper Stevedoring Company, in

working for Alcoa, has used separation paper? A. Yes, sir.

Q. When you do have occasion to use separation paper does Cooper Stevedoring Company furnish it or does Alcoa furnish it? A. Alcoa furnishes it.

Q. What kind of paper does Alcoa furnish for use as separation paper? A. Brown kraft paper.

Q. All right. There has been testimony in this case that when the ship arrived in Houston the longshoremen found a piece of paper about four feet wide and about ten feet long that was white paper. Some of them described it as corrugated, [377] but it was white paper.

Have you ever, while working for Cooper Stevedoring Company, ever used any paper of that description for separation paper or any other purpose? A. No, sir, not as I remember.

Q. So if that piece of paper was in the ship when it came to Houston, it certainly would not have been put there by Cooper Stevedoring employees, would it? A. No, sir.

MR. HARMON: I think that's all.

THE COURT: All right, Mr. Smith.

CROSS EXAMINATION

By Mr. Smith:

Q. Mr. Bru, would you agree that in loading these crates of bricks and furnace liner, that the man driving the fork-lift in the ship should put the crates as close to each other as they could get them? A. They do, yes, sir.

Q. They not only should, but they do? A. Put them as close as they can get them, right.

Q. And you shouldn't leave a hole six to seven inches, [378] or a gap, six or seven inches between the crates in the middle of the stow, should you? A. It should get as close as they can put them.

Q. Well, they should be able to get them close enough, according to these pictures, to where you won't have a six or seven-foot — six or seven-inch gap, should you? A. I wouldn't think that much, no, sir.

Q. So if one was — or, in loading these crates you will admit that if the longshoremen left a six or seven-foot gap between the crates, that he should not have done it? A. Six or seven foot?

Q. Six or seven inches. A. Sometimes, there might be an occasion where they won't quite fit any closer than that.

Q. Well, if there's nothing wrong with the crate, you will agree that you ought not to leave a six or seven-inch gap between the crate, should you? A. If it's a perfectly crate, it would probably get a little closer, yes.

Q. All right, sir. Now, you weren't down in the No. 1 hatch the whole time the ship was being loaded in Mobile, were you? [379] A. No, sir.

Q. You can't testify to what all the longshoremen down there were doing or not doing during the time they loaded these cartons of bricks in there, can you? A. No. I was not in the hold, I'm sure of that.

Q. Did you go down and inspect the hold after they got through before they closed it up? A. I looked in the hold from the main deck.

Q. From the hatch, the main deck? A. From the main deck.

Q. Couldn't see back in the wings, could you? A. I could see pretty well back in there. Maybe not all the way.

Q. Can you testify under oath to Judge Singleton that there was not a ten-foot piece of white paper down there when they closed the hatch in Mobile? A. I did not see a piece of white paper in the hold.

Q. Well, that's not my question. Can you swear to Judge Singleton that there wasn't one down there when

they closed the hatch? A. I can swear to Judge Singleton that I did not see one.

Q. But there could have been one and you didn't see [380] it? A. I don't think so. If it would, I believe I would have seen it, something as glaring as white paper.

MR. SMITH: I pass the witness, Judge.

MR. BROCK: Mr. Bru, I have one or two questions and I am going to try to be real brief.

CROSS EXAMINATION

By Mr. Brock:

Q. Who decides whether or not a partially-filled hatch with cargo shall or shall not be secured? Who makes that decision? A. In the case of—in this particular case, Alcoa Steamship Company is involved, the super cargo for Alcoa would tell me whether he wants it secured or not.

Q. Who? A. The super cargo representing Alcoa.

Q. All right. In other words, the ship owner?

MR. SMITH: That's the charterer, your Honor.

Q. (By Mr. Brock) The charterer of the ship? [381]

A. That would come through the chief officer and the super cargo for Alcoa.

Q. And the chief mate, is that who you're talking about?

A. Chief mate.

Q. And they are the ones that would tell you whether to secure it or not? A. That's correct.

Q. In connection with the proper way to stow brick, do you agree that brick should be stowed in a solid block? In other words, have it all stowed together in a solid block? Is that correct, sir? A. That's proper stowage.

Q. And do you also agree that the brick should be stowed in such a manner that should there be any openings in the

stowage of brick, that it should be — that either straw or dunnage or some matting should be used if the brick is not level and even? A. No, I don't agree with that.

Q. Sir? A. Not necessarily.

Q. Not necessarily. Have you ever used, in stowing any kind of cargo that Mr. Cooper described as [382] bulging — let's just assume these cartons bulged and you had spaces between the crates of cargo or the pieces of cargo. As a matter of good stevedoring practice, isn't it proper to see that those holes are filled in the loading process? A. Not when the — let's see how to put this. If there's just a small area between, then it wouldn't be necessary, no.

Q. Well, but if you have a bunch of crates or a bunch of cartons which have been described as sort of bulging and difficult to fit them together — A. Well, if it's bulging, it might fit close in the center, but the bulge would be here.

Q. All right. But wouldn't it be proper to stow those in such away, and to use either straw or a matting or dunnage, so that you would not leave any open pockets in the cargo? A. It would be if — I don't quite follow what you're — I mean, if it's any appreciable space, it would be —

Q. All right. Let's assume that you are looking over into that hatch like you said you were just before the hatch was covered. Did the cartons or crates or whatever you want to call them appear that the tops were fitting snugly against [383] one another? A. It appeared that they were.

MR. BROCK: All right. No further questions.

REDIRECT EXAMINATION

By Mr. Harmon:

Q. Mr. Bru, the majority of the cargo, I think we have already identified, was furnace lining, which is in bag

cargo, and it's — were you present when this picture No. 11 was taken? A. I think I was there, yes.

Q. All right, sir. You see this other picture here that's marked No. 10, you were also present when it was taken?

A. Yes, sir.

Q. And No. 10 is the actual — actually, it's a box with boards on the side and the top and it says here it was crated by A.S.D. Is that Alabama State Docks? A. Yes, sir.

Q. All right. On the other hand, picture marked No. 11 you see on the side has got thirty hundred pound bags KS-4?

A. Yes, sir.

[384] Q. And you notice here on the A. P. Green Company's shipping order on the cargo involved in this case, they describe it here as, some of these quantities, as hundred-pound bags KS-4? A. Yes, sir.

Q. All right. Now, when you try to stow cartons — furnace liner of this character on forklift trucks together, it is going to be humanly possible to get them together in that there's not going to be some separation at the top of the carton? A. No, sir.

Q. All right, sir. Now, was your company asked to make any special preparations to cover over this cargo so that it would be fit and ready to have other cargo stowed on top of it and be safe for the men to work on it? A. No, sir.

Q. If you had been the stevedore and had that cargo come in and were going to have your men work on top of it, would you have permitted them to have worked on top of it loading bags of grits or grain, hundred-pound bags, without having made some preparations to cover over these indentations at the top of the cargo in some fashion, by boards or otherwise? [385] A. I think proper stowage would be to put a floor of runnage down and make it level.

Q. All right, sir.

MR. HARMON: I think that's all.

MR. SMITH: I have no questions, your Honor.

THE COURT: All right.

MR. BROCK: I have no questions.

THE COURT: All right.

EXAMINATION

By the Court:

Q. Who makes the stowage plan? A. In Mobile, one of my clerks does it, chief clerk, sir.

Q. But this stowage plan has been introduced into evidence?

MR. HARMON: No. That's made by somebody else. That was made after it left Mobile.

THE WITNESS: This plan, yes.

THE COURT: Let me see the plan.

MR. SMITH: It's made and mailed, [386] a part of it.

THE COURT: Somebody made it?

MR. SMITH: It's a combination.

THE WITNESS: Well, yes, sir. What it is, your Honor, as Mobile starts the plan.

THE COURT: I understand.

THE WITNESS: And my chief clerk puts in what we load in Mobile and it goes to the next port.

Q. (By the Court) All right. Who determines where and how things are to be stowed? A. The super cargo for Alcoa Steamship Company, in this case. I mean, it varies in

different cases, but this particular one, the super cargo for Alcoa Steamship Company lays the ship out.

Q. What do you mean, the super cargo? A. He's the layout man for the cargo and he gets together and he lays it out.

Q. Gets together with who? A. Well, with me as the stevedore.

Q. All right. Then you determine where and how the cargo is to be stowed? A. He determines where.

Q. And you determine how? [387] A. Yes, sir.

Q. What responsibility, if any, does the ship have? A. The chief officer, he supervises the stowage of the cargo all the time. He's on the deck looking down to see that everything is going properly.

Q. And he, the chief officer, knows how and where the cargo is stowed? A. Yes.

Q. Does he have a copy of the original stowage plan? A. He has a copy of the complete stowage plan and he has the authority to stop us at any time if he sees something that doesn't suit him.

Q. Does he have the authority to tell you to do something that you don't have on the stowage plan? Let's assume in this case that you stowed these sixty-eight pallets. A. Yes, sir.

Q. Does the chief officer have the authority — and you have them stowed in this hatch No. 1 where they are stowed — does he have the authority to tell you to secure those better? A. Yes, sir.

Q. Was there anything else stowed in this hatch other than these sixty-eight bags when it left Mobile? [388] A. No, sir.

Q. Was it possible, when you climbed down the ladder through the hatch down to the hold, when you climbed down the ladder, did you have to get off of the ladder onto these palletized bags? A. Yes, sir.

Q. So you had to get onto them before you could get onto the floor of the hatch? A. Yes, sir.

THE COURT: Okay.

REDIRECT EXAMINATION

By Mr. Harmon:

Q. Mr. Bru, is this the copy of the stowage plan as it appears on your cargo or does this just show the Mobile cargo? A. Yes, sir, this is just the Mobile cargo.

Q. All right, sir. Now, do you know what the situation is, Mr. Bru, as to whether or not foreign vessels, the crew of foreign vessels, may go into the cargo spaces on occasions when the vessel is not in port?

MR. SMITH: I object, your Honor.

THE COURT: I'll sustain that objection.

[389] MR. HARMON: All right. No further questions.

THE COURT: Anything further?

MR. SMITH: I have a couple of questions in response to a couple.

RECROSS EXAMINATION

By Mr. Smith:

Q. Mr. Bru, are these pallets of brick and furnace liner very heavy? A. They are a little over a ton apiece, I'd say.

Q. So it's pretty heavy for that size that's in evidence? That's pretty heavy? Two or three men couldn't pick it up and move it? A. No, sir.

Q. They couldn't push it? A. No, sir.

Q. When the forklift sets it down that's where it's going to stay unless some unusual force is applied? A. Right.

Q. And stacking a tier of these, or these sixty-eight crates that you put in palletized crates, one layer in the hatch would be a pretty solid stow, would it not? [390]

A. Yes, sir.

Q. All right. You didn't recommend any securing fence or cable or chains or anything else be down to secure that cargo, did you? A. No, sir.

Q. And the reason was you didn't need one on that type of cargo; it's so heavy, its not going to move? Isn't that right? A. That's right. We didn't need one on that particular cargo.

MR. SMITH: Right. I pass the witness, judge.

THE COURT: All right.

REDIRECT EXAMINATION

By Mr. Harmon:

Q. Mr. Bru, you say that because of the nature of these bags, the nature of the packing, as that vessel would travel, say, from Mobile to New Orleans and then from New Orleans to Houston, you're not saying that the pallets are so heavy that there's not going to be some movement between the pallets, are you, sir? A. Well, I wouldn't—they might rock a little, but I don't think they would move very much unless [391] they got in awfully rough weather.

Q. All right. But insofar as the amount of separation that may be between the pallets, that is, a pallet might be right snug up against one because of the nature of the commodity that it's sitting on, but after the vessel has gone into the sea from Mobile, out into the Gulf and on to New Orleans and from New Orleans into Houston, it's not necessarily going to arrive in Houston with exactly the

same separation between the tops of the cargo as it was when it left Mobile, is it, sir? A. No. I guess it possibly could have a little shifting in there. I wouldn't say for sure.

MR. HARMON: All right. I think that's all.

THE COURT: Anything further?

MR. SMITH: No, your Honor.

THE COURT: All right, sir. You may step down. What do you say, gentlemen? Are you all through?

MR. HARMON: No, judge. We've got one more witness.

THE COURT: You have?

MR. HARMON: Mr. Van Johnson, Jr.

[392] THE COURT: He was the walking foreman for the Houston stevedore?

MR. SMITH: He's gone.

MR. HARMON: He's gone? He was sworn as a witness.

MR. SMITH: He was sworn as a witness, but he's not under subpoena. I decided not to use him and told him he could go as far as I was concerned. He wasn't under subpoena.

THE COURT: You want to get him back in the morning?

MR. HARMON: I think we should, judge.

MR. SMITH: He can call him as his witness.

MR. HARMON: We've got his statement here and I'll be glad to offer his statement.

THE COURT: You want to use his statement?

MR. SMITH: No, sir. That's hearsay.

MR. HARMON: Well, I didn't realize he was gone.

[393] THE COURT: I don't think you know what hearsay is. I think you out to get the book when you get back to Fulbright-Crooker and go down to the library and get Wigmore on Evidence and read what hearsay is.

MR. HARMON: This statement was taken, I'm sure, by Texas Employers Insurance Association.

THE COURT: What is your situation, Mr. Brock?

MR. BROCK: Judge, I am supposed to be in Judge Steiger's Court in Beaumont in the morning at 10:00 o'clock and if you can help me with Judge Steiger until we can finish here in the morning and get over there and drive over there, that's fine. I'm confident you can.

MR. HARMON: I'm not offering this evidence insofar as Mr. Brock's case is concerned. I'm just offering it for the case between me and the ship. As far as I'm concerned, the evidence can be closed as far as Mr. Brock is [394] concerned. I guess it already is because he's not suing my client. This is strictly a lawsuit between the Houston stevedore and their insurance carrier.

THE COURT: Do you want to go on and let them offer Mr. whatever his name is without you being here?

MR. SMITH: We'll just introduce the statement, judge.

MR. HARMON: All right.

THE COURT: Suits me. I don't know what the statement says.

MR. SMITH: It's his statement.

THE COURT: Let's see the statement.

All right. File the statement of Mr. Van Johnson, Jr., as an exhibit, third party defendant Cooper's exhibit whatever it is.

MR. HARMON: That's all we have, your Honor.

THE COURT: Which was it? 5?

THE CLERK: Sir?

THE COURT: What exhibit number was it?

[395] THE CLERK: 7.

. . .

[411] These are the Court's findings of facts and conclusions of law, in accordance with Rule 52(A) of the Federal Rules of Civil Procedure.

. . .

Mr. Sessions was working aboard the "S/S Karina" on July the 2nd, 1969. The "S/S Karina" was docked at the Manchester Docks [412] in the City of Houston and the work being undertaken on that day that Mr. Sessions was concerned with was the loading of bags of grits or rice or some similar type of product; that this loading operation was going on in the No. 1 hold of the "Karina"; that Mr. Sessions was working for the Midgulf Stevedoring Company.

The "S/S Karina" was owned and operated by Fritz Kopke, Inc. and/or the Alcoa Steamship Company; that the operations started at 10:00 o'clock; that Mr. Sessions and his gang were the first people to do down into the No. 1 hatch; that before the "Karina" docked in Houston, the "Karina" had been at the Port of Mobile where there

was loaded into the No. 1 hatch sixty-eight palletized crates or bags of fire brick and furnace liner; that this weighed ninety-two tons; that all of it was loaded or stowed in the No. 1 hold in one tier; that these palletized crates had been loaded by the Cooper Stevedoring Company in Mobile; that there was no dunnage across the top of them; that the top was uneven; that the type of palletized crates are best described by pictures No. 11 and No. 10. The fire brick was like picture No. 10. The furnace liner was [413] like picture No. 11. From those, you can tell that certainly the top was not a smooth working surface; that in order to get down in the hold No. 1, you had to walk on top of this stow; that Mr. Sessions, in working and loading these sacks of grits or rice, or whatever they were, stepped into an opening between these palletized crates as he was carrying a sack weighing approximately a hundred pounds of grits; that as he fell, he wrenched his back to such an extent that it brought about a herniated disc between the L-5 and the L-4 inner spaces; that that condition resulted in an operation performed by Dr. Goodall where Dr. Goodall performed what is generally referred to as a laminectomy. The result was good.

Mr. Sessions today is fifty-four years old. He had an annual earning capacity before the accident of approximately \$6,500.00 a year; that as a result of this injury and operation, he has been unable to work as he did work, since this accident, and has earned less money from the day of the accident till today on a yearly basis; that Dr. Goodall testified that through the exercises that he had given him, that there's [414] no reason why he should not have a recovery to his back where he would be able to continue to perform the work of a longshoreman; that because of the operation, it was his recommendation that he not perform any work that would require lifting of any object

over seventy-five to a hundred pounds. Mr. Sessions is a longshoreman of considerable experience, having been a longshoreman since 1957. He has a double A seniority rating.

The testimony of Mr. Hocker, who is a longshoreman of long standing since 1934 and has a double gold star, is that a man in the Port of Houston with a double A rating should be able to and has been able to get key jobs, key jobs consisting of operating towmotors, being a hook-on man, a winch operator, et cetera.

The evidence would lead this Court to conclude that Mr. Sessions should be able to continue working as a longshoreman, not doing heavy work, but because of his seniority, should be able to get lighter work on a regular basis, but that he will have some disability as a result of this injury.

Dr. Tom Moore and Dr. Goodall [415] both testified that his efficiency, his ability to obtain and retain employment as a longshoreman, should be reduced by something like fifteen percent.

I find that, with reference to the stow, that of course the ship has the primary responsibility, legally, of cargo stowage; that this type of stowage was stowed in the hold with nothing else in it; that some type of arrangements should have been conducted to assure that the stow would not, in its trip from Mobile to Houston, move so as to leave spaces between the crates and/or some type of dunnage should have been put on top of the stow, because it was obvious to anyone that in order to get down into the hold to stow other cargo, which it was obvious that other cargo was going to have to be stowed in that hold, you would have to walk over the crates that were stowed there. Consequently, the manner and method in which it was stowed brought

about an unsafe place to work and brought about an unseaworthy condition on the part of the "Karina."

That Cooper Stevedoring Company was responsible for the stowage and that they [416] were negligent in not stowing this cargo in a manner and method in which people could safely walk on top of them, because it was obvious that other longshoremen in other ports would have to work on top of them. It is difficult from this evidence for the Court to evaluate exactly the responsibility between the shipowner on the one hand and Cooper on the other.

As an aside, the Midgulf Stevedores were dismissed from this case on the 14th day of October, 1971, and the ship took over the defense of the case on behalf of Midgulf and on behalf of the ship.

MR. HARMON: Judge, I think it is the other way around.

THE COURT: Oh, Midgulf took over on behalf of the ship. That's correct. Well, no. Midgulf was dismissed.

MR. HARMON: That's right, Judge, but that was after they had agreed to indemnify the ship, take over the defense.

THE COURT: According to the testimony of Mr. Smith, there was an agreement between the Midgulf and the ship that Midgulf would indemnify the ship against any loss.

[417] The evidence also indicates that for some unexplained reason there was a piece of paper, which has been described as approximately ten feet long and three or four feet wide, left on top of these boxes. And from all of the testimony, the Court can reach no conclusion other than that piece of paper was over the space through which Mr. Sessions' foot slipped. Consequently, Mr. Sessions could not have seen the space because of the paper.

The evidence leads the Court to the conclusion that the piece of paper certainly wasn't put there by Midgulf, the stevedoring company in Houston. Midgulf had done nothing in this hold that day up until 10:00 o'clock when the hatch was first opened at 10:00 a.m. that morning, and Mrs. Sessions' injury occurred sometime before noon.

There is no testimony to indicate that the Midgulf Stevedoring Company or the longshoremen employed by Midgulf brought any paper into the hold. Where the paper came from, the Court is unable to determine, whether it was left there by the Cooper people or whether it was left there by the ship personnel. But the fact of [418] the matter is it was there, apparently, because there's no other evidence but that it was there. The paper itself and the place on which it was brings about an unsafe condition in that it hid the space through which Mr. Sessions' foot slipped.

All of that, leads the Court to the conclusion that since the ship itself has a responsibility on cargo and Cooper has a responsibility since they loaded it, and I can see nothing that would lead to any negligence on the part of Midgulf, that because of the unexplained presence of the paper, the Court comes to the conclusion the only thing to do is to divide the liability in this case equally among the ship and Cooper.

And that is what I find, that they are each fifty percent responsible for the injury to Mr. Sessions.

As to amount, it seems to the Court that for the pain and suffering in the past—I don't know how you arrive at that. You just have to do it through experience, I guess. It seems to me like \$10,000 would be a reasonable sum of money for past pain and suffering.

[419] Pain and suffering in the future. Taking Dr. Good-

all's testimony, taking the fact that from all the evidence in this case, reading Dr. Moore's report — the results of the surgery were good; there's nothing about the surgery that brought about anything that should cause any problem in the future — that although Mr. Sessions still complains of low back pain, and of course when you have an operation on the back the Court's own common experience from this and other cases leads him to the conclusion that it is **reasonable to assume that some pain will remain with Mr. Sessions in the future**, and I have allocated \$5,000 for that.

Taking into consideration Mr. Sessions' past earnings, the earnings that he has had since the accident, what he has worked, taking into consideration the increases in hourly rates that have been granted to longshoremen during the intervening years, he has had about two and a half years of some loss of earnings from the date of the accident to the date of the trial, and this Court concludes a total loss of earnings in the amount of \$7,500.

As to future loss of earnings, [420] taking the fifteen percent loss of efficiency or loss of earnings capacity or loss of ability to obtain and retain employment as a longshoreman, and taking his hourly wage and allocating twenty more years of productive life in this field to Mr. Sessions — he is now fifty-four years old, that would make him seventy-four; that's a little generous — but taking twenty years that means future loss of earnings of \$14,625.

The medical is all in the pretrial order. It is apparently stipulated to it is \$590 for Dr. Goodall, \$718.90, Memorial Baptist, \$86 to the Memorial Radiology Association, \$32 to Lederer & Associates for laboratory work, Anesthesia, \$78, and I believe Dr. Goodall testified that he had about \$50 more or \$75 more — fifty, wasn't it?

MR. OLDHAM: Twenty-five to fifty, your Honor.

THE COURT: \$50 more medical. And whatever that adds up to.

There is a lien in this case of Texas Employers' Insurance Company of \$626.07 plus \$361.25. What does that add up to?

MR. SMITH: Give men the figures again.

[421] THE COURT: Your Pretrial Order says \$626.07 and \$361.25. Whatever that total is will have to come off of the total of what we have added up here. I have not added up that total.

MR. OLDHAM: \$987.32.

THE COURT: How much?

MR. OLDHAM: \$987.32.

THE COURT: What does the medical come to?

MR. BROCK: That's the total comp and medical, isn't it?

MR. OLDHAM: Yes. That is the total of both.

THE COURT: What do the medical bills add up to? I have not added them up. I have not added up \$590 and those. I haven't added those up.

MR. OLDHAM: Fifteen fifty-four ninety, I believe, your Honor.

THE COURT: Fifteen fifty-four ninety?

MR. OLDHAM: Yes, your Honor.

THE COURT: If fifteen fifty-four ninety is the total medical—is that the total medical?—I find no future medical.

[422] MR. BROCK: I made no proof on it.

THE COURT: Is fifteen fifty-four ninety the amount? Do you want to agree on that? Is that the medical?

MR. OLDHAM: That's the figure I got, adding up the figures you read out, sir.

MR. BROCK: Was how much?

THE COURT: Fifteen fifty-four ninety. So my calculations come to \$38,679.90 and lien would have to come off of that or they get a judgment, Texas Employers' get a judgment for the lien, do they not, nine hundred and something?

Okay. Sould I find anything else?

MR. SMITH: I think you should make a finding that Cooper breached its warranty of workmanlike service to the vessel owner by negligently stowing the —

THE COURT: Well, if I need to say that — I have said that they negligently stowed it, so that negligent stowage amounted to as a breach of their obligation to —

MR. SMITH: Stow the cargo in a workmanlike manner, which breaches the warranty of workmanlike service.

[423] THE COURT: Okay. The warranty of workmanlike service. And that will constitute the findings of fact and conclusions of law and the judgment of this Court unless somebody says I have to make other findings.

Now, what i will do, if anyone is going to appeal this case, I would request and order them to let me know, so that I can write this up in the form of a memorandum opinion. I will try not to make, if that happens, any additional findings that I have not made here, but I will dress it up in language in the form of a memorandum opinion and order.

MR. HARMON: Judge, I would like to ask Mrs. Gavales, when she gets an opportunity, to write this up and let me have an opportunity to look at it. I have been trying to follow it very carefully and I think the Court has covered most points, but I would like to look at the Court's findings here.

THE COURT: All right. Are there any other findings that anybody thinks I ought to make that I have not made, that you can think of?

MR. HARMON: Judge, in this regard, [424] I say I don't know, in view of the Court's findings about the paper and the fact that the Court was not favorable to find that Cooper Stevedoring Company —

THE COURT: I can't find who put the paper where it is. All I can find is the paper was there.

MR. HARMON: I understand. The shipowner failed in his burden to proving that we put it there. This is why I say before I know I am going to want any other findings in regard to this, I want to look at this.

THE COURT: If anybody wants any other findings, let me know what it is. If you want to appeal, I want the opportunity — I don't want any mistake about it, because I got very mad in a case where I said this and I did this and the lawyers appealed it and I didn't know it. And what I call the idiotic Court of Appeals — and I'll say it on the record — reversed me saying I didn't make findings of fact and conclusions of law. And I sated in the transcript that I was making findings of fact and conclusions of law and read it off, just like I did now, and they sent it back to me to make findings of fact and [425] conclusions of law.

So I got hot. I got hot with the lawyers not telling me they were going to appeal it, because the record is clear in

the case. It said if they wanted to appeal it, let me know and I was going to dress up what I was going to do. Instead, we wasted a lot of time because, apparently, the Fifth Circuit didn't read it or if they read it, I didn't spell it out like, you know, I'm doing this in accordance with Rule 52(A).

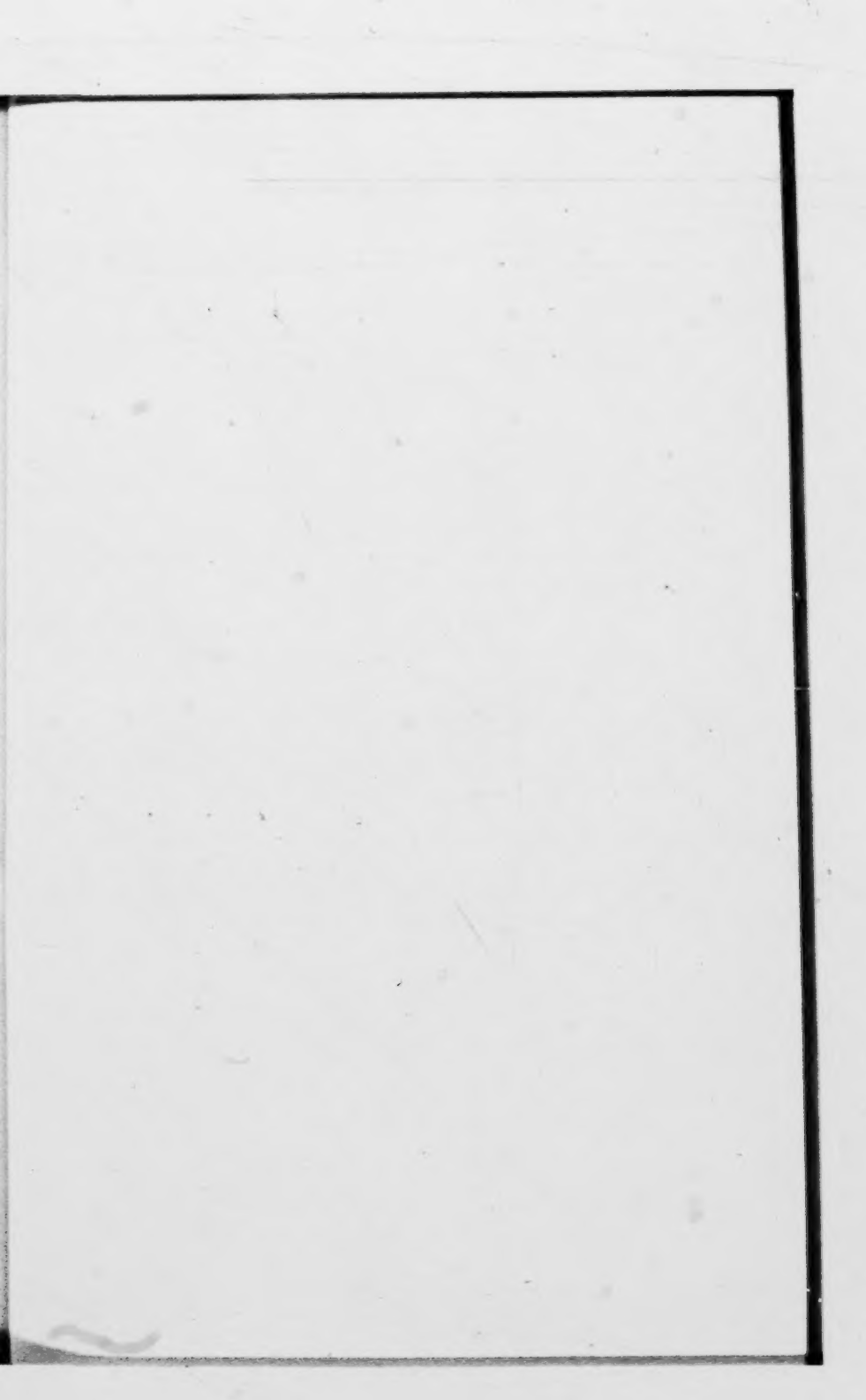
MR. HARMON: Yes, sir.

THE COURT: Okay.

MR. SMITH: Can we have an opportunity to review your findings?

THE COURT: Yes, sir. All right. We will stand adjourned.

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NOV 2

MICHAEL RODAN

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. ~~72-556~~

COOPER STEVEDORING COMPANY,
Petitioner

v.

FRITZ KOPKE ET AL.,
Respondents

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

*To The Honorable The Chief Justice and The Associate
Justices of The Supreme Court of The United States:*

Petitioner, Cooper Stevedoring Company, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case.

OPINION BELOW

The district court did not prepare a written opinion. Its findings of fact and conclusions of law were announced from the bench at the conclusion of the trial, and the transcript of those findings, as reproduced on pp. 186-196 of the

Appendix filed in the Court of Appeals, is attached hereto as Exhibit B. The opinion of the United States Court of Appeals for the Fifth Circuit, as modified on rehearing, is reported at 479 F.2d 1041. The original opinion of the Court and the modification on rehearing is reproduced in Appendix A to this Petition.

JURISDICTION

The original opinion of the Court of Appeals was rendered on July 1, 1973. The opinion was modified and rehearing denied in other respects on August 6, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Is there a right of contribution in non-collision maritime cases?

STATEMENT OF THE CASE

The original plaintiff, Troy Sessions, was injured when he was working as a longshoreman in the Port of Houston aboard the SS KARINA, a vessel owned and operated by respondent, Fritz Kopke, Inc. and under time charter to respondent Alcoa Steamship Company (hereinafter collectively referred to as the "vessel"). Sessions was injured as he walked on top of palletized crates of cargo that had previously been loaded aboard the vessel in Mobile by petitioner Cooper Stevedoring Company. Sessions stepped into an opening between two crates, which was concealed by a piece of paper.

The vessel brought an action for indemnity against Sessions' employer, Mid-Gulf Stevedores, Inc., and against

Cooper, alleging that the stevedores breached their implied warranties of workmanlike performance owing to the vessel. See *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). Sessions did not sue Cooper directly. Shortly before the trial, Mid-Gulf took over the defense of the vessel, agreeing to indemnify the vessel fully. Mid-Gulf was then dismissed, and its attorneys were substituted as attorneys for the vessel.

After a trial to the court sitting without a jury, the district court found that the vessel was unseaworthy, that the vessel owner and Cooper were negligent, that the vessel was not entitled to obtain indemnity from Cooper because it was guilty of conduct sufficient to preclude indemnity, but that the vessel was entitled to contribution against Cooper for one-half of the damages awarded to Sessions against the vessel. Judgment in favor of Sessions was satisfied by Mid-Gulf, which had agreed to indemnify the vessel.

Cooper appealed, arguing that it was improper for the court to award the vessel contribution. The vessel (through attorneys for Mid-Gulf) cross-appealed, contending that the vessel was entitled to indemnity from Cooper. The Court of Appeals affirmed, holding: (1) that the district court's findings of conduct sufficient to preclude indemnity were not clearly erroneous, and (2) that under previous decisions of the Fifth Circuit contribution was properly allowed.

REASON FOR GRANTING THE WRIT

The Fifth Circuit's decision in allowing contribution in this non-collision admiralty case is in direct conflict with this Court's decisions in *Atlantic Coast Line R. Co. v. Erie Lackawanna R. Co.*, 406 U.S. 340 (1972) and *Halycon Lines et al v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952).

In *Atlantic Coast Line R. Co. v. Erie Lackawanna R. Co.*, this Court held:

"We agree that in this noncollision admiralty case the District Court properly dismissed petitioner's third party complaint for contribution against respondent Erie on the authority of *Halycon Lines v. Haenn Ship Corp.*, 342 U.S. 282 (1952)." 406 U.S. at 340.

It is undisputed this is a non-collision admiralty case. In granting contribution in the face of *Atlantic*, the Court of Appeals for the Fifth Circuit relied upon its decisions prior to *Atlantic* which had held that the *Halycon* rule was inapplicable "where the joint tortfeasor against whom contribution is sought is not immune from tort liability by statute." See *Horton & Horton, Inc. v. T./S. J. E. Dyer*, 428 F.2d 1131 (5th Cir. 1970) cert. denied 400 U.S. 993 (1971); *Watz v. Zapata Offshore Company*, 431 F.2d 100 (5th Cir. 1970).*

The decisions by the Fifth Circuit in *Horton*, *Watz* and now in this case create a right of contribution in non-collision admiralty cases in direct contravention of both the rationale of this Court's decision in *Halycon* and the precise holdings in *Atlantic* and *Halycon*. The entire basis of the *Halycon* decision was that:

* The Second Circuit in *In Re Seaboard Shipping*, 449 F.2d 132 (1971), cert. denied 406 U.S. 949 (1972) followed *Horton* and *Watz* in a decision rendered before this Court's decision in *Atlantic*. This Court denied certiorari in *Seaboard* shortly after the *per curiam* decision in *Atlantic*.

"... it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await Congressional action." 342 U.S. at 285."

This Court said in the *Halcyon* case:

"In the absence of legislation, courts exercising a common-law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors.

...

"... Congress has already enacted much legislation in the area of maritime personal injuries. . . . Many groups of persons with varying interests are vitally concerned with the proper functioning and administration of all these Acts as an integrated whole. We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups. The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run. . . . Should a legislative inquiry convince Congress that a right to contribution among joint tortfeasors is desirable, there would still be much doubt as to whether application of the rule or the amount of contribution should be limited by the Harbor Workers' Act, or should be based on an equal division of damages, or should be relatively apportioned in accordance with the degree of fault of the parties.

"In view of the foregoing, and because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so." 342 U.S. at 285-7.

The *per curiam* decision in *Atlantic* was expressly based "on the authority" of *Halcyon*, which can only mean that this Court was reaffirming the rationale of *Halcyon* as well as the holding of the Court on the facts before it.

If the reasoning of the *Halcyon* case had sufficient force to form a basis for this Court's opinion in *Atlantic*, that reasoning should have equal force now.

In 1972 the Congress did adopt substantial changes in the Longshoremen's and Harborworkers' Compensation Act.* Section 18(a) of the 1972 Act amended Section 5(a) of the Act (33 U.S.C. § 905) in a manner which substantially alters the rights of an injured longshoreman to recover damages from the vessel and further provides that "the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void." The continuing legislative interest of the Congress in this area of the law underscores the original wisdom of the *Halcyon* reasoning as reaffirmed in *Atlantic*. The legislative process which led to the enactment of the 1972 Act involved just the sort of interaction of "many groups of persons with varying interests," and the Congressional action involved "a fair accommodation of the diverse but related interests of these groups." 342 U.S. at 286. Congress can be presumed to have enacted this legislation with full appreciation of this Court's decisions in *Halcyon* and *Atlantic*, and thus this Court and the lower courts should be even more reluctant now to intervene in this area of substantial statutory involvement. Cf. *Flood v. Kuhn*, 407 U.S. 258 (1972); *Apex Hosiery v. Leader*, 310 U.S. 469, 487-9 (1940); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 15-18 (1941); *Joseph v. Carter & Weekes Co.*, 330 U.S. 422, 428 (1947); *Walling v. Halliburton Oil Well Cementing Co.*, 331 U.S. 17, 25-26 (1947).

* Even if those amendments had become effective before this accident, the outcome of this case would not have been directly affected by the Act, since the plaintiff recovered against the vessel for negligence, and the vessel's indemnity/contribution claim against the Mobile stevedore was not against an "employer" under the Act.

The Fifth Circuit's decision in this case, of course, attempts to distinguish *Halcyon* and *Atlantic*. That distinction, based upon *Horton* and *Watz* which were decided by the Fifth Circuit before *Atlantic*, is that there is no prohibition against contribution "where the joint tortfeasor against whom contribution is sought is not immune from tort liability by statute." This "distinction" is not based upon any language or reasoning in either *Halcyon* or *Atlantic*. On the contrary, in *Atlantic* this Court was careful to point out that the case was a "non-collision" admiralty case. That statement can only mean that for purposes of determining whether or not there is a right of contribution in admiralty, there are two kinds of cases: collision cases and non-collision cases. In collision cases there has long existed a rule of contribution through the divided damages rule, and this rule long preceded any legislative activity in the area. In non-collision cases there was no such right before *Halcyon* and none thereafter until *Horton* and *Watz*. If this Court in *Atlantic* wanted to leave standing the *Horton-Watz* exception to the *Halcyon* rule, this Court would not have referred to the case as a "non-collision admiralty case."

The *Horton-Watz* exception to the *Halcyon* rule also does not survive the precise holding of *Atlantic*. Not only does the rationale of *Halcyon* have continuing vitality which would be completely undermined by adoption of the *Horton-Watz* exception, but a careful consideration of the facts before the Court in *Atlantic* shows that *Horton* and *Watz* are overruled because the party against whom contribution was sought was not statutorily immune from direct action by the plaintiff. The original plaintiff, Benazet, an employee of Erie, was injured while working on a box car owned by Atlantic. At the time of the accident the boxcar was located on a barge owned by Erie which was moored in the Hudson River in New York harbor. Benazet sued and recovered

against Atlantic on a negligence theory. He did not sue his employer, Erie, since, as the district court noted (315 F.Supp. 357 at 364, footnote 4), he was covered by the Longshoremen's and Harborworkers' Compensation Act. In *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334 (1953), this Court held that a "railroad employee's remedy was under the Harborworkers' Act exclusively and not under the F.E.L.A." But Benazet's disability from suing Erie for *negligence* does not mean that he could not have sued Erie, as the vessel owner, for *unseaworthiness*. The district court said:

"Since *O'Rourke*, however, longshoremen, covered by the Harbor Workers' Act, have been permitted to sue their own employer, where that employer is also the shipowner, for unseaworthiness, despite the provision of the Harbor Workers' Act that the liability of an employer under the Act 'shall be exclusive and in place of all other liability.' See *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 731, 87 S.Ct. 1419, 18 L.Ed. 2d 488 (1967). Although plaintiff Benazet is not a longshoreman, the Supreme Court's reliance in *Jackson* on its expansive grant of the benefits of the seaworthiness doctrine to a wide range of maritime employees combined with its announced desire to avoid a 'harsh and incongruous result' leads us to conclude that *this plaintiff would probably be entitled to maintain a suit based on unseaworthiness of the carfloat owned by his employer Erie.*" 315 F.Supp. at 364, ftne 4. (Emphasis added)

Thus, the district court in *Atlantic* assumed that the party against whom contribution was sought was *not* immune by statute from direct suit by the plaintiff. The district court's reading of the effect of *Jackson v. Lykes* upon *O'Rourke* is correct and is further supported by *Reed v. The Yaka*, 373 U.S. 410 (1963). The *O'Rourke* case was a 5-4 decision, with Justices Warren, Black, Clark and

Minton dissenting. The decision was written by Justice Reed, who was one of the dissenters in *Halcyon*. Justice Black's view became the majority, however, and he wrote the decisions in *Jackson v. Lykes* and *Reed v. Yaka*, with Justices Stewart and Harlan dissenting. Although *O'Rourke* has never been expressly overruled by this Court, it has not been cited by this Court since *Reed v. Yaka*, and it is obvious that the views of the minority in *O'Rourke* became law in the later decisions.

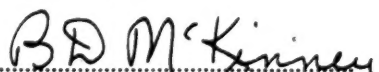
This Court need not overrule *O'Rourke* in order to reach the result urged by petitioner. By the same token, however, *O'Rourke* need not be expanded in such a way as to undermine the legitimate breadth of *Atlantic*. A fair reading of all of the decisions of this Court culminating in *Atlantic* leads to the inescapable conclusion that the *Atlantic* case means exactly what it says: "There is no right of contribution in non-collision admiralty cases" — irrespective of the right of the plaintiff to bring a direct action against the party against whom contribution is being sought.

This Court should grant certiorari to decide this question if for no other reason than to eliminate the confusion which currently exists in the lower courts. At least one court has refused to follow *Horton-Watz* subsequent to *Atlantic*. See, *Coggins v. James W. Elwell & Co.*, 356 F.Supp. 612 (E.D.Pa. 1973). Other lower courts refused to follow *Horton* and *Watz* before this Court's decision in *Atlantic*. See, *In Re Standard Oil Company of California*, 325 F. Supp. 388 (N.D.Calif. 1971); *Sears Roebuck & Co. v. American President Lines, Ltd.*, 345 F.Supp. 395 (N.D. Calif. 1971); *Nickert v. Puget Sound Tug & Barge Co.*, 335 F.Supp. 1158 (W.D.Wash. 1972). One district court decision in the Fifth Circuit allowed "contribution" in the sense of an equitable apportionment of damages, not a 50% contribution. *Houston-New Orleans, Inc. v. Page Engineering Co.*, 353 F.Supp. 890 (E.D.La. 1972).

CONCLUSION

For the foregoing reasons a Writ of Certiorari should be issued from this Court to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,


.....
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CERTIFICATE OF SERVICE

On this the 31 day of October, 1973, a true and correct copy of the foregoing Petition for Writ of Certiorari was forwarded to counsel for respondents, Messrs. Dixie Smith and H. Lee Lewis, Jr. of Fulbright, Crooker and Jaworski, at Bank of the Southwest Building, Houston, Texas, 77002.


.....
JOSEPH D. CHEAVENS

A-1

EXHIBIT A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1467

TROY M. SESSIONS,

Plaintiff-Appellee,

v.

FRITZ KOPKE, INC., ET AL,

*Defendants-Third Party
Plaintiffs-Appellees and
Cross Appellants,*

v.

COOPER STEVEDORING COMPANY, INC.,

*Third Party Defendant-
Appellant and Cross Appellee.*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS

(June 1, 1973)

Before MORGAN, CLARK and INGRAHAM,
Circuit Judges.

INGRAHAM, Circuit Judge: The SS KARINA, a vessel owned and operated by Fritz Kopke, Inc., and under charter to the Alcoa Steamship Company, was loaded with palletized crated cargo by the employees of Cooper Stevedoring Company at Mobile, Alabama. The KARINA departed Mobile and arrived at Houston on or about July 2, 1969, where employees of Mid-Gulf Stevedores, Inc., prepared to load sacked cargo.

Troy Sessions, a longshoreman employed by Mid-Gulf, was one of the first men to enter the hold of the ship. The Mid-Gulf employees were required to walk atop the previously loaded palletized crates in order to store the cargo they were bringing aboard ship. Sessions stepped into an opening between two crates which was concealed by a covering of corrugated paper, and thereby sustained certain personal injuries.

Sessions brought an action against Fritz Kopke and the Alcoa Steamship Company (collectively referred to as the vessel) seeking to recover damages for his injuries. The vessel in turn sought indemnity against Mid-Gulf and Cooper. Prior to trial the vessel compromised and settled its claim against Mid-Gulf, which was then dismissed from the suit. After a trial to the court, sitting without a jury, the vessel was found to be unseaworthy and damages were awarded to the plaintiff in the amount of \$38,679.90. No one appeals from this award. The court found that Cooper had negligently stowed the cargo it loaded in Mobile and had thus breached the warranty of workmanlike performance it owed to the vessel. Denying the vessel's claim for a full indemnity, the court awarded the vessel contribution from Cooper as a joint tort-feasor for 50% of the damages.

Cooper appeals. The vessel cross-appeals, contending that there was no basis for the trial court's denial of

its claim to full indemnity from Cooper. While our appellate review of this case is made somewhat difficult by the fact that neither the vessel nor Cooper requested that the trial court make formal findings of fact or conclusions of law which specifically dealt with the various rights and liabilities of the parties, nevertheless, we find ample basis for this holding in the oral decision announced by the judge at the conclusion of the case. Fairly read, the holding does make it clear that the court considered the vessel's conduct precluded its full recovery on the indemnity claim because it failed to fulfill its primary responsibility under its arrangement with Cooper to assure that some type of dunnage was placed on top of the cargo. On the record before us we cannot conclude that this finding was clearly erroneous.

On its appeal Cooper Stevedoring asserts that the trial court's award of contribution in a non-collision maritime case is in direct conflict with the Supreme Court's decisions in *Halcyon Lines, et al v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), and *Atlantic Coast Line R. Co. v. Erie Lackawanna R. Co.*, 406 U.S. 340 (1972).

Halcyon, supra, held that there was no right to contribution between a shipowner and a shoreside contractor who are joint tort-feasors in a case involving injuries to an employee of the contractor while engaged in repair work on a ship. The apparent prohibition against contribution in a non-collision maritime case has been held inapplicable where the joint tort feisor against whom contribution is sought is not immune from tort liability by statute. *Horton & Horton, Inc. v. T/S J. E. Dyer*, 428 F.2d 1131 (5th Cir., 1970), cert. den. 400 U.S. 993 (1971); *Watz v. Zapata Offshore Company*, 431 F.2d 100 (5th Cir., 1970); *In re Seaboard Shipping*, 449 F.2d 132 (2nd Cir., 1971), cert. den. 406 U.S. 949 (1972).

In the present case Sessions, in addition to suing the vessel, could have proceeded directly against Cooper Stevedoring as Cooper was not his employer and, therefore, not shielded by the limited liability of the Longshoremen and Harbor Workers Act.

The Supreme Court's per curiam affirmance of the *Atlantic* case, *supra*, in no way necessitates a reexamination of our prior holdings. An examination of the district court's opinion in that case (reported at 315 F.Supp. 357 [1970]) indicates that the employer against whom contribution was sought enjoyed statutorily imposed limited liability and, therefore, would have fallen without our *Horton-Watz* exception to the *Halcyon* rule.

Finding both parties' additional assertions of error without merit, we therefore AFFIRM the judgment of the district court.

AFFIRMED.

A-5

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1467

TROY M. SESSIONS,

Plaintiff-Appellee,

v.

FRITZ KOPKE, INC., ET AL,

*Defendants-Third Party
Plaintiffs-Appellees and
Cross Appellants,*

v.

COOPER STEVEDORING COMPANY, INC.,

*Third Party Defendant-
Appellant and Cross Appellee.*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING

(August 6, 1973)

Before MORGAN, CLARK and INGRAHAM,
Circuit Judges.

INGRAHAM, Circuit Judge: The court, having received a petition for rehearing in the above entitled and numbered cause, modifies its opinion of June 1, 1973, by deleting the eighth paragraph thereof. In its place the court substitutes the following paragraph:

The Supreme Court's per curiam affirmance of the *Atlantic* case, *supra*, does not necessitate a reexamination of our prior decisions. It is unclear from the district court's opinion, 315 F.Supp. 357 (S.D.N.Y., 1970), as well as from the Second Circuit's affirmance thereof, 442 F.2d 357 (1971), whether our *Horton-Watz* exception to the *Halcyon* rule was even applicable under the facts of *Atlantic*. Moreover, neither court directly questioned the decisions in *Horton* and *Watz*. In these circumstances and absent a reference in the Supreme Court's short per curiam opinion to these decisions, we do not read *Atlantic* as silently overruling *Horton* and *Watz*.

In all other respects the petition for rehearing is DENIED.

EXHIBIT B

Mr. Sessions was working aboard the "S/S Karina" on July the 2nd, 1969. The "S/S Karina" was docked at the Manchester Docks [412] in the City of Houston and the work being undertaken on that day that Mr. Sessions was concerned with was the loading of bags of grits or rice or some similar type of product; that this loading operation was going on in the No. 1 hold of the "Karina"; that Mr. Sessions was working for the Midgulf Stevedoring Company.

The "S/S Karina" was owned and operated by Fritz Kopke, Inc. and/or the Alcoa Steamship Company; that the operations started at 10:00 o'clock; that Mr. Sessions and his gang were the first people to go down into the No. 1 hatch; that before the "Karina" docked in Houston, the "Korina" had been at the Port of Mobile where there was loaded into the No. 1 hatch sixty-eight palletized crates or bags of fire brick and furnace liner; that this weighed ninety-two tons; that all of it was loaded or stowed in the No. 1 hold in one tier; that these palletized crates had been loaded by the Cooper Stevedoring Company in Mobile; that there was no dunnage across the top of them; that the top was uneven; that the type of palletized crates are best described by pictures No. 11 and No. 10. The fire brick was like picture No. 10. The furnace liner was [413] like picture No. 11. From those, you can tell that certainly the top was not a smooth working surface; that in order to get down in the hold No. 1, you had to walk on top of this stow; that Mr. Sessions, in working and loading these sacks of grits or rice, or whatever they were, stepped into an opening between these palletized crates as he was carrying a sack weighing approximately a hundred pounds of grits; that as he fell, he wrenched his back to such an extent that it brought about a herniated disc between the L-5 and the L-4 inner spaces; that that condition resulted in an opera-

tion performed by Dr. Goodall where Dr. Goodall performed what is generally referred to as laminectomy. The result was good.

Mr. Sessions today is fifty-four years old. He had an annual earning capacity before the accident of approximately \$6,500.00 a year; that as a result of this injury and the operation, he has been unable to work as he did work, since this accident, and has earned less money from the day of the accident till today on a yearly basis; that Dr. Goodall testified that through the exercises that he had given him, that there's [414] no reason why he should not have a recovery to his back where he would be able to continue to perform the work of a longshoreman; that because of the operation, it was his recommendation that he not perform any work that would require lifting of any object over seventy-five to a hundred pounds. Mr. Sessions is a longshoreman of considerable experience, having been a longshoreman since 1957. He has a double A seniority rating.

The testimony of Mr. Hocker, who is a longshoreman of long standing since 1934 and has a double gold star, is that a man in the Port of Houston with a double A rating should be able to and has been able to get key jobs, key jobs consisting of operating towmotors, being a hook-on man, a winch operator, et cetera.

The evidence would lead this Court to conclude that Mr. Sessions should be able to continue working as a longshoreman, not doing heavy work, but because of his seniority, should be able to get lighter work on a regular basis, but that he will have some disability as a result of this injury.

Dr. Tom Moore and Dr. Goodall [415] both testified that his efficiency, his ability to obtain and retain employment

as a longshoreman, should be reduced by something like fifteen percent.

I find that, with reference to the stow, that of course the ship has the primary responsibility, legally, of cargo stowage; that this type of stowage was stowed in the hold with nothing else in it; that some type of arrangements should have been conducted to assure that the stow would not, in its trip from Mobile to Houston, move so as to leave spaces between the crates an/or some type of dunnage should have been put on top of the stow, because it was obvious to anyone that in order to get down into the hold to stow other cargo, which it was obvious that other cargo was going to have to be stowed in that hold, you would have to walk over the crates that were stowed there. Consequently, the manner and method in which it was stowed brought about an unsafe place to work and brought about an unseaworthy condition on the part of the "Karina."

That Cooper Stevedoring Company was responsible for the stowage and that they [416] were negligent in not stowing this cargo in a manner and method in which people could safely walk on top of them, because it was obvious that other longshoremen in other ports would have to work on top of them. It is difficult from this evidence for the Court to evaluate exactly the responsibility between the shipowner on the one hand and Cooper on the other.

As an aside, the Midgulf Stevedores were dismissed from this case on the 14th day of October, 1971, and the ship took over the defense of the case on behalf of Midgulf and on behalf of the ship.

Mr. Harmon: Judge, I think it is the other way around.

The Court: Oh, Midgulf took over on behalf of the ship. That's correct. Well, no. Midgulf was dismissed.

Mr. Harmon: That's right, Judge, but that was after they had agreed to indemnify the ship, take over the defense.

The Court: According to the testimony of Mr. Smith, there was an agreement between the Mid-gulf and the ship that Midgulf would indemnify the ship against any loss.

[417] The evidence also indicates that for some unexplained reason there was a piece of paper, which has been described as approximately ten feet long and three to four feet wide, left on top of these boxes. And from all of the testimony, the Court can reach no conclusion other than that this piece of paper was over the space through which Mr. Sessions' foot slipped. Consequently, Mr. Sessions could not have seen the space because of the paper.

The evidence leads the Court to the conclusion that the piece of paper certainly wasn't put there by Midgulf, the stevedoring company in Houston. Midgulf had done nothing in the hold that day up until 10:00 o'clock when the hatch was first opened at 10:00 a.m. that morning, and Mr. Sessions' injury occurred sometime before noon.

There is no testimony to indicate that the Midgulf Stevedoring Company or the longshoremen employed by Midgulf brought any paper into the hold. Where the paper came from, the Court is unable to determine, whether it was left there by the Cooper people or whether it was left there by the ship personnel. But the fact of [418] the matter is it was there, apparently, because there's no other evidence but that it was there. The paper itself and the place on which it was brings about an unsafe condition in that it hid the space through which Mr. Sessions' foot slipped.

All of that, leads the Court to the conclusion that since the ship itself has a responsibility on cargo and Cooper

has a responsibility since they loaded it, and I can see nothing that would lead to any negligence on the part of Midgulf, that because of the unexplained presence of the paper, the Court comes to the conclusion the only thing to do is to divide the liability in this case equally among the ship and Cooper.

And that is what I find, that they are each fifty percent responsible for the injury to Mr. Sessions.

As to amount, it seems to the Court that for the pain and suffering in the past — I don't know how you arrive at that. You just have to do it through experience, I guess. It seems to me like \$10,000 would be a reasonable sum of money for past pain and suffering.

[419] Pain and suffering in the future. Taking Dr. Goodall's testimony, taking the fact that from all the evidence in this case, reading Dr. Moore's report — the results of the surgery were good; there's nothing about the surgery that brought about anything that should cause any problem in the future — that although Mr. Sessions still complains of low back pain, and of course when you have an operation on the back the Court's own common experience from this and other cases leads him to the conclusion that it is reasonable to assume that some pain will remain with Mr. Sessions in the future, and I have allocated \$5,000 for that.

Taking into consideration Mr. Sessions' past earnings, the earnings that he has had since the accident, what he has worked, taking into consideration the increases in hourly rates that have been granted to longshoremen during the intervening years, he has had about two and a half years of some loss of earnings from the date of the accident to the date of trial, and this Court concludes a total loss of earnings in the amount of \$7,500.

As to future loss of earnings, [420] taking the fifteen percent loss of efficiency or loss of earning capacity or loss of ability to obtain and retain employment as a longshoreman, and taking his hourly wage and allocating twenty more years of productive life in this field to Mr. Sessions — he is now fifty-four years old, that would make him seventy-four; that's a little generous — but taking twenty years that means future loss of earnings of \$14,625.

The medical is all in the pretrial order. It is apparently stipulated to it is \$590 for Dr. Goodall, \$718.90, Memorial Baptist, \$86 to the Memorial Radiology Association, \$32 to Lederer & Associates for laboratory work, Anesthesia, \$78, and I believe Dr. Goodall testified that he had about \$50 more or \$75 more — fifty, wasn't it?

Mr. Oldham: Twenty-five to fifty, your Honor.

The Court: \$50 more medical. And whatever that adds up to.

There is a lien in this case of Texas Employers' Insurance Company of \$626.07 plus \$361.25. What does that add up to?

Mr. Smith: Give me the figures again.

[421] The Court: Your Pretrial Order says \$626.07 and \$361.25. Whatever that total is will have to come off of the total of what we have added up here. I have not added up that total.

Mr. Oldham: \$987.32.

The Court: How much?

Mr. Oldham: \$987.32.

The Court: What does the medical come to?

Mr. Brock: That's the total comp and medical, isn't it?

Mr. Oldham: Yes, That is the total of both.

The Court: What do the medical bills add up to? I have not added them up. I have not added up \$590 and those. I haven't added those up.

Mr. Oldham: Fifteen fifty-four ninety, I believe, your Honor.

The Court: Fifteen fifty-four ninety?

Mr. Oldham: Yes, your Honor.

The Court: If fifteen fifty-four ninety is the total medical — is that the total medical? — I find no future medical.

[422] Mr. Brock: I made no proof on it.

The Court: Is fifteen fifty-four ninety the amount? Do you want to agree on that? Is that the medical?

Mr. Oldham: That's the figure I got, adding up the figures you read out, sir.

Mr. Brock: Was how much?

The Court: Fifteen fifty-four ninety. So my calculations come to \$38,679.90 and lien would have to come off of that or they get a judgment, Texas Employers' get a judgment for the lien, do they not, nine hundred and something?

Okay. Should I find anything else?

Mr. Smith: I think you should make a finding that Cooper breached its warranty of workmanlike service to the vessel owner by negligently stowing the —

The Court: Well, if I need to say that — I have said that they negligently stowed it, so that negligent stowage amounted to as a breach of their obligation to —

Mr. Smith: Stow the cargo in a workmanlike manner, which breaches the warranty of workmanlike service.

[423] The Court: Okay. The warranty of workmanlike service. And that will constitute the findings of fact and conclusions of law and the judgment of this Court unless somebody says I have to make other findings.

Now, what I will do, if anyone is going to appeal this case, I would request and order them to let me know, so that I can write this up in the form of a memorandum opinion. I will try not to make, if that happens, any additional findings that I have not made here, but I will dress it up in language in the form of a memorandum opinion and order.

Mr. Harmon: Judge, I would like to ask Mrs. Gavales, when she gets an opportunity, to write this up and let me have an opportunity to look at it. I have been trying to follow it very carefully and I think the Court has covered most points, but I would like to look at the Court's findings here.

The Court: All right. Are there any other findings that anybody thinks I ought to make that I have not made, that you can think of?

Mr. Harmon: Judge, in this regard, [424] I say I don't know, in view of the Court's findings about the paper and the fact that the Court was not favorable to find that Cooper Stevedoring Company —

The Court: I can't find who put the paper where it is. All I can find is the paper was there.

Mr. Harmon: I understand. The shipowner failed in his burden of proving that we put it there. This is why I say before I know I am going to want any other findings in regard to this, I want to look at this.

The Court: If anybody wants any other findings, let me know what it is. If you want to appeal, I want the opportunity — I don't want any mistake about it, because I got very mad in a case where I said this and I did this and the lawyers appealed it and I didn't know it. And what I call the idiotic Court of Appeals — and I'll say it on the record — reversed me saying I didn't make findings of fact and conclusions of law. And I had stated in the transcript that I was making findings of fact and conclusions of law and read it off, just like I did now, and they sent it back to me to make findings of fact and [425] conclusions of law.

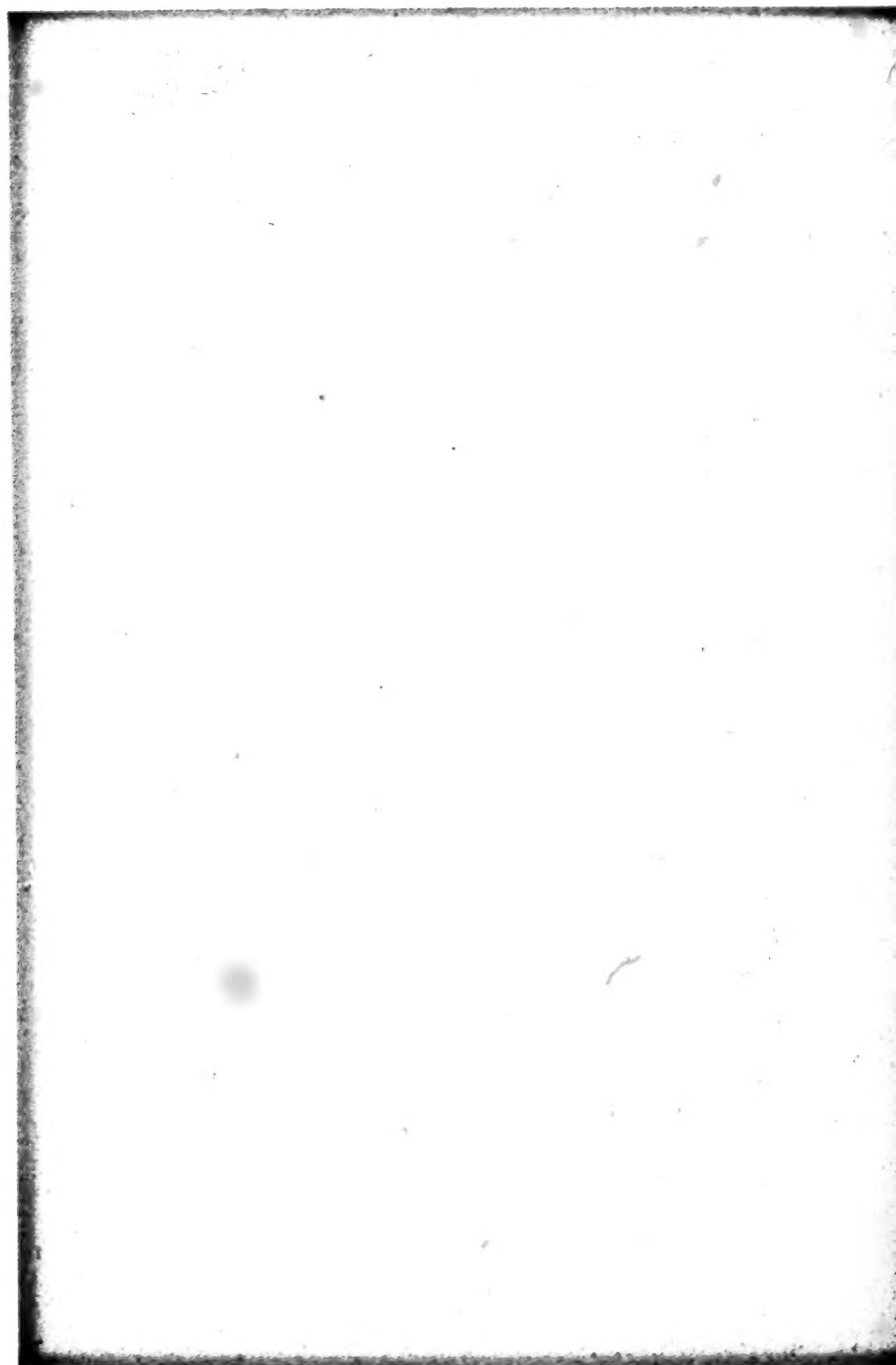
So I got hot. I got hot with the lawyers not telling me they were going to appeal it, because the record is clear in the case. It said if they wanted to appeal it, let me know and I was going to dress up what I was going to do. Instead, we wasted a lot of time because, apparently, the Fifth Circuit didn't read it or if they read it, I didn't spell it out like, you know, I'm doing this in accordance with Rule 52(A).

Mr. Harmon: Yes, sir.

The Court: Okay.

Mr. Smith: Can we have an opportunity to review your findings?

The Court: Yes, sir. All right. We will stand adjourned.



IN THE
Supreme Court of the United States
October Term, 1973

NO. 73-726

COOPER STEVEDORING COMPANY, Petitioner

v.

FRITZ KOPKE, ET AL, Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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IN THE
Supreme Court of the United States
October Term, 1973

NO. 73-726

COOPER STEVEDORING COMPANY, *Petitioner*

v.

FRITZ KOPKE, ET AL, *Respondents*

**On Petition for a Writ of Certiorari to The
United States Court of Appeals for the
Fifth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

*To The Honorable The Chief Justice and The Associates
Justices of The Supreme Court of The United States:*

Respondents here oppose the Petition for a Writ of
Certiorari to The United States Court of Appeals for The
Fifth Circuit.

STATUTES INVOLVED

Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1426, 33 U.S.C. §905 (1970), which provides as follows:

"Exclusiveness of liability

"The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an insured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

QUESTION PRESENTED

In a maritime personal injury case, is there a right of contribution among joint tortfeasors who share a common liability to the injured party?

STATEMENT OF THE CASE

This case originated as an action in admiralty for damages by Troy Sessions, a longshoreman, who sustained personal injuries while in the course of his employment

by a Houston stevedoring contractor. While working in a hold of the vessel SS KARINA at Houston, Sessions was injured when he stepped into a concealed hole in a stow of palletized cargo which had been previously loaded aboard the vessel at Mobile, Alabama, by employees of Petitioner, Cooper Stevedoring Company ("Cooper"). Sessions sued Respondents, Fritz Kopke, Inc. and Alcoa Steamship Company, as owner and charterer of the KARINA (hereinafter collectively referred to as "the Vessel").

The Vessel impleaded both the Houston stevedore and Cooper, seeking indemnity in respect of Session's claim. Prior to trial, the Vessel entered into a compromise and settlement of its claim against the Houston stevedore, which was then dismissed from the suit.

Upon trial of the cause, the District Court found that the KARINA was unseaworthy by reason of the stowage of the cargo, that the Vessel and Cooper were both negligent with respect to the stowage, and that Cooper had breached its implied warranty of workmanlike service owing to the Vessel. (Contrary to the assertion contained in Petitioner's "Statement of the Case," the District Court did *not* find that the Vessel "was guilty of conduct sufficient to preclude indemnity.") On the basis of these findings, the Vessel was awarded contribution for fifty percent of the damages paid to Sessions. (Transcript of District Court's oral findings of fact and conclusions of law, Exhibit B of Petition.)

Cooper appealed the award of contribution, and the Vessel cross-appealed seeking full indemnity. The Court of Appeals affirmed, construing the District Court's findings as justifying a holding that the Vessel's conduct precluded its recovery of full indemnity for breach of

Cooper's warranty, and that contribution between the Vessel and Cooper as joint tortfeasors was proper. (Exhibit A of Petition)

ARGUMENT

THE HOLDING OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

Cooper seeks to establish a "conflict" between the result reached by the Court of Appeals in this case and the prior decisions of this Court in *Halcyon Lines, et al v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), and *Atlantic Coast Line R. Co. v. Erie Lackawanna R. Co.*, 406 U.S. 340 (1972). There is no conflict presented by the holdings of these cases, which are readily distinguishable upon the facts.

Halcyon was a suit by a ship repair employee against a shipowner for injuries sustained while working aboard the defendant's vessel. The shipowner sought to implead the plaintiff's employer, a repair contractor, seeking contribution from the employer as a joint tortfeasor. As a worker covered by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901 et seq., the plaintiff was himself precluded from suing his employer. This Court held that contribution would not lie in view of the employer's statutory grant of limited liability for injuries of its employees.

However, in a case where neither tortfeasor is statutorily immune from liability to the injured party, neither the rule nor the reason of *Halcyon's* prohibition against contribution is applicable. Accordingly, the Fifth Circuit, in *Horton & Horton, Inc. v. T/S J. E. DYER*, 428 F.2d

1131 (5th Cir. 1970), cert. den. 400 U.S. 993 (1971); and *Watz v. Zapata Offshore Company*, 431 F.2d 100 (5th Cir. 1970), and the Second Circuit, in *In re Seaboard Shipping*, 449 F.2d 132 (2d Cir. 1971), cert. den. 406 U.S. 949 (1972), have held that the prohibition of *Halcyon* against contribution between joint tortfeasors in admiralty does not apply to a situation where none of the tortfeasors possesses a statutory immunity from tort liability and the injured party could have proceeded against any of the tortfeasors and could have recovered damages from each. In the present case, Cooper, not being Session's employer and hence not shielded by the Longshoremen's and Harborworkers' Act, was potentially liable and vulnerable to suit by Sessions no less than was the Vessel. Given the common liability of the tortfeasors to the injured party, *Halcyon* is inapplicable.¹

The *Atlantic* case was a *per curiam* affirmance by this Court of the Second Circuit's decision in *Benazet v. Atlantic Coast Line R. Co. v. Erie Lackawana R. Co.*, 442 F.2d 694 (2d Cir. 1971). The case arose out of a suit by a yard brakeman, employed by Erie, for injuries sustained by him while working on a box car owned by another railroad, Atlantic, while the box car was being transported on a carfloat barge owned by the plaintiff's

1. This interpretation of *Halcyon* has been espoused by the author of the opinion. Twelve years after he wrote for the Court in that case, Mr. Justice Black characterized the decision as follows:

"In *Halcyon* * * * we held that the system of compensation which Congress established in the Longshoremen's and Harbor Workers' Compensation Act as the sole liability of a stevedoring company to its employees prevented a shipowner from shifting all or part of his liability to the injured longshoreman onto the stevedoring company, the longshoreman's employer." *Italia Società per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315, 325 (1964) (Black, J., dissenting).

employer. The accident was allegedly due to a defective footboard and handbrake of the box car, and the plaintiff sued Atlantic for its negligence in supplying the defective equipment. Atlantic sought contribution from Erie on the ground that the plaintiff's employer was also actively negligent in causing the injury. Both the District Court and the Second Circuit denied Atlantic's claim on the ground that contribution under the facts of the case was precluded by *Halcyon*. This Court affirmed with a one-sentence comment that the third party complaint for contribution "in this noncollision admiralty case" was properly dismissed on the authority of *Halcyon*.

Cooper argues that this pronouncement is authority for extending the rule of *Halcyon* beyond the facts of that case to encompass the situation where the joint tortfeasor against whom contribution is sought does not enjoy statutory immunity from tort liability. Firstly, Cooper points to the Court's description of the *Atlantic* case as a "non-collision admiralty case" and contends that this "can only mean that for purposes of determining whether or not there is a right of contribution in admiralty, there are two kinds of cases: collision cases and non-collision cases." Secondly, Cooper asserts that *Atlantic* must be read as overruling the prior decisions of the lower courts because "the party against whom contribution was sought [in that case] was not statutorily immune from direct action by the plaintiff."

It is sufficient answer to the first contention to note that it is an obvious nonsequitur and a proposition unsupported by authority. The second proposition is likewise erroneous: there was no common liability of the two tortfeasors to the plaintiff in *Atlantic*. As the District Court pointed out in its opinion, reported at 315 F. Supp.

357, the limited liability provisions of the Longshoremen's and Harbor Workers' Compensation Act were applicable and shielded the plaintiff's employer from direct suit in view of this Court's holding in *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334 (1952). 315 F. Supp. 364, f.n. 4. In *O'Rourke* it was specifically held that a railroad brakeman who was injured while working on a freight car situated on a carfloat moored on navigable waters was subject exclusively to the Longshoremen's and Harbor Worker's Compensation Act.

However, Cooper persists by arguing that the plaintiff in *Atlantic* could have sued his employer, Erie, for the unseaworthiness of its "vessel" (the carfloat) under the rule of *Reed v. The Yaka*, 373 U.S. 410 (1963), where this Court held that a longshoreman was not deprived by the Longshoremen's and Harbor Worker's Act of his remedy based upon *unseaworthiness* of a vessel that happens to be owned by his employer.

In the first place, it is not at all clear that the plaintiff in *Atlantic* had any such remedy. As is evident from the opinions of the lower courts, that case was tried practically to a conclusion without any recognition by the parties of the applicability of maritime principles. Many facts relevant to the rights of the parties—such as whether the plaintiff was a "seaman" in the contemplation of *Seas Shipping Co. v. Sieracki*, 328 U.S. 84 (1946), whether the carfloat was a "vessel in navigation," whether the defective condition of the box car could and did render the carfloat unseaworthy, the existence and breach of any *Ryan*-type warranties (c.f., *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956)) or contractual liabilities between the two railroads—were not adequately developed or resolved at trial.

However, even assuming that the plaintiff in *Atlantic* might have sued his employer for the unseaworthiness of the carfloat, notwithstanding the employer's potential liability arising out of his obligations as a shipowner, he cannot, given the applicability of the Longshoremen's and Harborworkers' Compensation Act, be liable to his employee for negligence, either directly or—in view of *Halcyon*—indirectly. This Court has consistently characterized a shipowner's liability for unseaworthiness as a "traditional, absolute, and non-delegable obligation which it should not be permitted to avoid." *Reed v. The Yaka*, *supra*, 373 U.S. at 415. It is peculiar to and inherent in his obligations as a shipowner:

"* * * Among these is the obligation of seaworthiness. It is peculiarly and exclusively the obligation of the owner * * *" *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85, 100 (1946).

It does not in any sense constitute a basis of common liability for concurrent fault with a third party—which is the *sine qua non* of the right of contribution.

Since it is apparent that this Court's holding in *Halcyon*, as applied in *Atlantic*, is not in conflict with the result reached in this case, there is no justification upon that ground for issuance of a writ of certiorari.

THERE IS NO CONFLICT OF DECISIONS OF THE COURTS OF APPEALS WHICH HAVE CONSIDERED THE ISSUE PRESENTED BY THE PRESENT CASE.

Besides the Court of Appeals for the Fifth Circuit, the only other Court of Appeals to consider the question of

whether a right of contribution exists among joint tortfeasors sharing a common liability to the injured party in a maritime personal injury case, is that of the Second Circuit. That Court followed the Fifth Circuit's holding in the *Horton* and *Watz* cases in *In re Seaboard Shipping*, 440 F.2d 132 (2d Cir. 1971), cert. den. 406 U.S. 949 (1972). There is no present conflict among the Circuits on this issue, and accordingly there is no warrant upon that ground for this Court's review.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the Petition for a Writ of Certiorari should be in all things denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief in Opposition to the Petition for Writ of Certiorari was served upon Messrs. B. D. McKinney and Joseph D. Cheavens, 3000 One Shell Plaza, Houston, Texas 77002, attorneys for Petitioner, by mailing copies of same to them by certified mail, return receipt requested, this _____ day of November, 1973.

FILED

FEB 23 1974

MICHAEL J. ...

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-726

COOPER STEVEDORING COMPANY,
Petitioner

v.

FRITZ KOPKE ET AL.,
Respondents

BRIEF FOR PETITIONER

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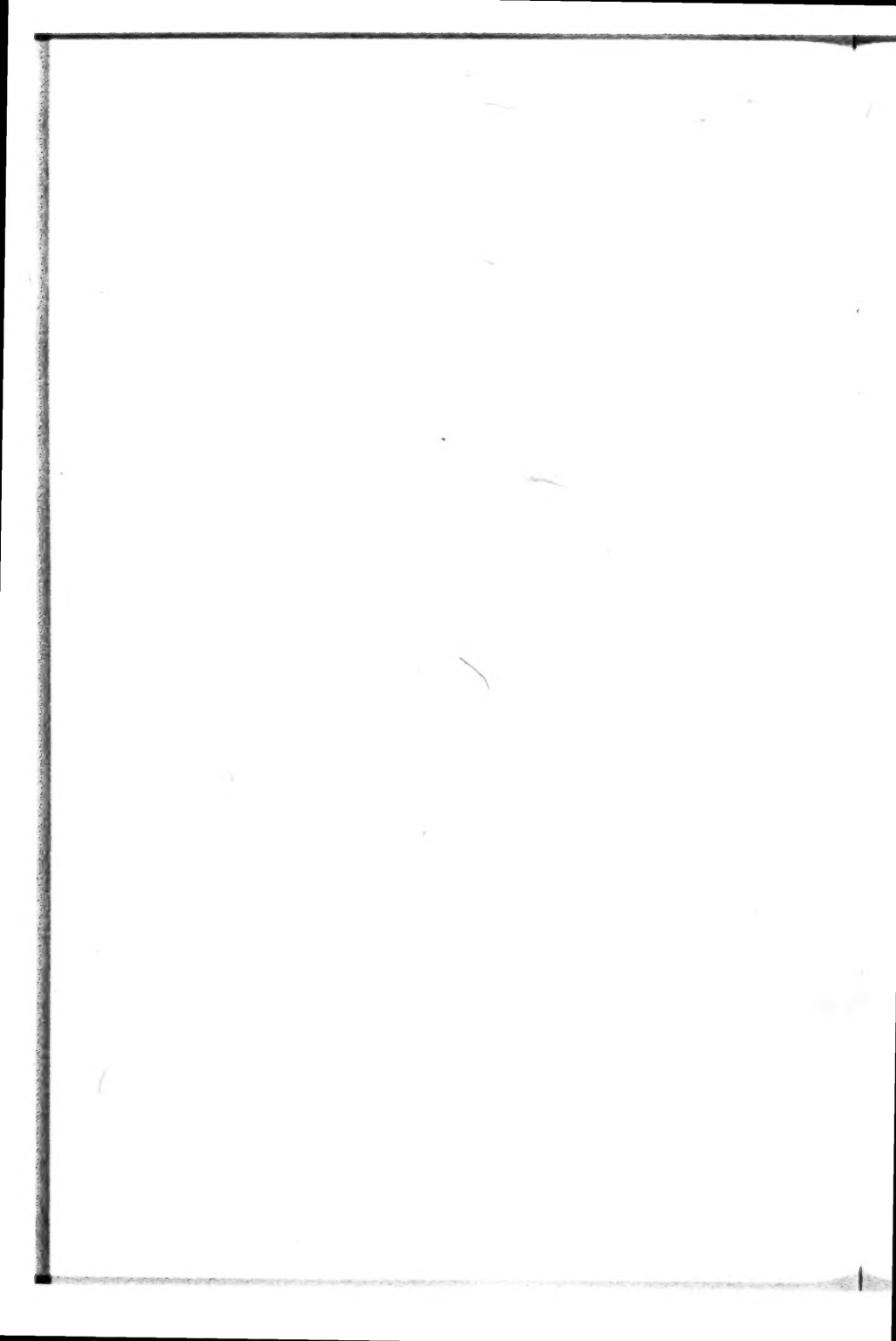
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No. 73-726

COOPER STEVEDORING COMPANY
Petitioner

v.

FRITZ KOPKE ET AL.,
Respondents

BRIEF FOR PETITIONER

OPINION BELOW

The district court did not prepare a written opinion. Its findings of fact and conclusions of law were announced from the bench at the conclusion of the trial, and the transcript of those findings is reproduced on pp. 16 of the Appendix and is Exhibit B to the Petition for Writ of Certiorari. The opinion of the United States Court of Appeals for the Fifth Circuit, as modified on rehearing, is reported at 479 F.2d 1041. The original opinion of the Court and the modification on rehearing is reproduced on

pp. 18-23 of the Appendix and in Exhibit A to the Petition for Writ of Certiorari.

JURISDICTION

The original opinion of the Court of Appeals was rendered on July 1, 1973. The opinion was modified and rehearing denied in other respects on August 6, 1973. The jurisdiction of this Court rests on 28 U.S.C. §1254 (1).

STATUTES INVOLVED

Section 18(a) of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, amending Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C. §905, provides:

"EXCLUSIVENESS OF REMEDY AND THIRD-PARTY LIABILITY

"Sec. 5(a) The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

"(b) In the event of injury to a person covered under this Act caused by the negligence of a vessel,

then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act."

QUESTIONS PRESENTED

1. Is there a right of contribution in non-collision maritime cases?
2. If there is such a right, should Respondent be allowed to recover contribution in this case against Petitioner?

STATEMENT OF THE CASE

The original plaintiff, Troy Sessions, was injured when he was working as a longshoreman in the Port of Houston aboard the SS KARINA, a vessel owned and operated by respondent, Fritz Kopke, Inc. and under time charter to respondent Alcoa Steamship Company (hereinafter collectively referred to as the "vessel"). Sessions was injured as he walked on top of palletized crates of cargo that had previously been loaded aboard the vessel in Mobile by petitioner Cooper Stevedoring Company. Sessions stepped

into a space between two crates which was concealed by a piece of paper.

The vessel brought an action for indemnity against Sessions' employer, Mid-Gulf Stevedores, Inc., and against Cooper, alleging that the stevedores breached their implied warranties of workmanlike performance owing to the vessel. See *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). No claim for contribution was asserted by the vessel against either stevedore in either the pleadings (A. 4-7) or the Pre-Trial Order (A. 8-17). Sessions did not sue Cooper directly, and neither stevedore brought a cross-action against the other. Shortly before the trial, Mid-Gulf took over the defense of the vessel, agreeing to indemnify the vessel fully. Mid-Gulf was then dismissed, and its attorneys were substituted as attorneys for the vessel.

After a trial to the court sitting without a jury, the district court found that the vessel was unseaworthy, that the vessel and Cooper were negligent, that the vessel was not entitled to obtain indemnity from Cooper because it was guilty of conduct sufficient to preclude indemnity, but that the vessel was entitled to contribution against Cooper for one-half of the damages awarded to Sessions against the vessel. Judgment in favor of Sessions was satisfied by Mid-Gulf, which had agreed to indemnify the vessel.

Cooper appealed, arguing that it was improper for the court to award the vessel contribution. The vessel (through attorneys for Mid-Gulf) cross-appealed, contending that the vessel was entitled to indemnity from Cooper. The Court of Appeals affirmed holding: (1) that the district court's findings of conduct sufficient to preclude indemnity were not clearly erroneous and thus indemnity was properly denied, and (2) that under previous decisions of the Fifth Circuit contribution was properly allowed.

SUMMARY OF ARGUMENT

This is a non-collision admiralty case in which the district court granted contribution. This Court's decisions in *Halcyon Lines, et al. v. Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282 (1952) and *Atlantic Coast Line R. Co. v. Erie Lackawanna R. Co.*, 406 U.S. 340 (1972) hold that there is no right of contribution in a non-collision admiralty case. The Fifth Circuit in this case and earlier cases has improperly restricted the *Halcyon* rule to cases where the tort-feasor against whom contribution is sought is statutorily immune from direct action by the plaintiff. That distinction cannot be supported by the language and reasoning of either *Halcyon* or *Atlantic*, and thus this case is controlled by *Halcyon* and *Atlantic*.

The *Halcyon* case was properly decided and should not be overruled. *Halcyon* rested upon the considered view that only the Congress could create a right of contribution in non-collision admiralty cases. Because of continued Congressional action in this area, and because of the creation of the right of indemnity, the reasoning of the *Halcyon* case has even more validity now than it did in 1952.

Even if *Halcyon* and *Atlantic* are thought to be inapplicable, or if they are to be overruled, contribution should still not be allowed in this case for a number of reasons: First, the party seeking contribution has already been fully indemnified, and thus its cause of action for contribution has been extinguished. Second, no claim for contribution was asserted by respondent in either the pleadings or in the pre-trial order. Third, under the undisputed facts of the case petitioner did not violate any duty it owed either to the vessel or to the plaintiff. Fourth, any cause of action in a non-collision admiralty case should be limited to an

equitable apportionment of damages between parties who are not subject to the indemnity rules of *Ryan Stevedoring v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956).

ARGUMENT

I.

AT THIS TIME THERE IS NO RIGHT OF CONTRIBUTION AMONG JOINT TORT-FEASORS IN ADMIRALTY. THIS COURT SHOULD NOT OVERRULE ITS PRIOR DECISIONS SO HOLDING AND CREATE SUCH A RIGHT IN THIS CASE.

In 1952 this Court in a 7-2 decision in *Halcyon Lines, et al. v. Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282, held that there was no right of contribution in a non-collision admiralty case. In 1972 in *Atlantic Coast Line R. Co. v. Erie Lackawanna R. Co.*, 406 U.S. 340, this Court held:

"We agree that in this noncollision admiralty case the District Court properly dismissed petitioner's third party complaint for contribution against respondent Erie on the authority of *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282... (1952)." 406 U.S. at 340.

This case is squarely controlled by *Halcyon* and *Atlantic*. Only by overruling *Halcyon* and *Atlantic* may this Court affirm this case. In this section of the Brief, petitioner will demonstrate, first, that adherence to *Halcyon* and *Atlantic* requires affirmance; and, second, that *Halcyon* and *Atlantic* were correctly decided and should not be overruled.

A. *Atlantic* and *Halcyon* control.

It is undisputed that this a non-collision admiralty case. In granting contribution in the face of *Halcyon* and *Atlantic*, the Court of Appeals for the Fifth Circuit relied upon its decisions prior to *Atlantic* which had held that the *Halcyon*

rule was inapplicable "where the joint tort-feasor against whom contribution is sought is not immune from tort liability by statute." See *Horton & Horton, Inc. v. T./S. J. E. Dyer*, 428 F.2d 1131 (5th Cir. 1970), cert. denied 400 U.S. 993 (1971); *Watz. v. Zapata Offshore Company*, 431 F.2d 100 (5th Cir. 1970).*

The decisions by the Fifth Circuit in *Horton*, *Watz* and now in this case create a right of contribution in non-collision admiralty cases in direct contravention of both the rationale of this Court's decision in *Halcyon* and the precise holdings in *Atlantic* and *Halcyon*. The entire basis of the *Halcyon* decision was that:

"... it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action." 342 U.S. at 285.

This Court said in the *Halcyon* case:

"In the absence of legislation, courts exercising a common-law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors. . . .

"... Congress has already enacted much legislation in the area of maritime personal injuries. . . . Many groups of persons with varying interests are vitally concerned with the proper functioning and administration of all these Acts as an integrated whole. We think that legislative consideration and action can best

* The Second Circuit in *In Re Seaboard Shipping*, 449 F.2d 132 (1971), cert. denied 406 U.S. 949 (1972) followed *Horton* and *Watz* in a decision rendered before this Court's decision in *Atlantic*. This Court denied certiorari in *Seaboard* shortly after the *per curiam* decision in *Atlantic*. In *Seaboard*, however, the Second Circuit placed some significance on the fact that an injury to a person covered by the Longshoremen's and Harbor Workers' Act was not involved. 449 F.2d at 138-9.

bring about a fair accomodation of the diverse but related interests of these groups. The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run Should a legislative inquiry convince Congress that a right to contribution among joint tortfeasors is desirable, there would still be much doubt as to whether application of the rule or the amount of contribution should be limited by the Harbor Workers' Act, or should be based on an equal division of damages, or should be relatively apportioned in accordance with the degree of fault of the parties.

"In view of the foregoing, and because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so." 342 U.S. at 285-7.

The *per curiam* decision in *Atlantic* was expressly based "on the authority" of *Halcyon*, which can only mean that this Court was reaffirming the rationale of *Halcyon* as well as the holding of the Court on the facts before it. If the reasoning of the *Halcyon* case had sufficient force to form a basis for this Court's opinion in *Atlantic*, that reasoning should have equal force now.

In *Atlantic* this Court was careful to point out that the case was a "non-collision" admiralty case. That statement can only mean that for purposes of determining whether or not there is a right of contribution in admiralty, there are two kinds of cases: collision cases and non-collision cases. In collision cases there has long existed a rule of contribution through the divided damages rule, and this rule long preceded any legislative activity in the area. In non-collision cases before *Halcyon*, at least one Circuit Court had denied contribution* and until *Horton* and *Watz*,

* *American Mutual Insurance Company v. Matthews*, 182 F.2d 322 (2nd Cir. 1950).

the *Halcyon* rule was uniformly followed.* Indeed, this Court in *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956), recognized a cause of action for breach of an implied warranty of workmanlike performance, thus allowing a cause of action in admiralty cases for indemnity. This cause of action for indemnity has been defined and elaborated in a great volume of litigation since. If this Court in *Atlantic* wanted to leave standing the *Horton-Watz* exception to the *Halcyon* rule, this Court would not have referred to the case as a "non-collision admiralty case" but as a case where the party against whom contribution was sought was statutorily immune to direct action by the plaintiff.

This Court did not say that, however, because the party against whom contribution was sought was not statutorily immune from direct action by the plaintiff. The original plaintiff, Benazet, an employee of Erie, was injured while working on a boxcar owned by Atlantic. At the time of the accident, the boxcar was located on a barge owned by Erie which was moored in the Hudson River in New York Harbor. Benazet sued and recovered against Atlantic on a negligence theory. He did not sue his employer, Erie, since, as the district court noted (315 F.Supp. 357 at 364, footnote 4), he was covered by the Longshoremen's and Harbor Workers' Compensation Act. In *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334 (1953), this Court held that a "railroad employee's remedy was under the Harbor-workers' Act exclusively and not under the F.E.L.A." But Benazet's disability from suing Erie for *negligence* does

* See e.g., *McLaughlin v. Trelleborgs Angfartygs A/B*, 408 F.2d 1334 (2d Cir. 1969), cert. denied 395 U.S. 946. *Mendez v. States Marine Lines, Inc.*, 421 F.2d 851 (3rd Cir. 1970).

not mean that he could not have sued Erie, as the vessel owner, for *unseaworthiness*. The district court said:

"Since *O'Rourke*, however, longshoremen, covered by the Harbor Workers' Act, have been permitted to sue their own employer, where that employer is also the shipowner, for *unseaworthiness*, despite the provision of the Harbor Workers' Act that the liability of an employer under the Act 'shall be exclusive and in place of all other liability.' See *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 731, 87 S.Ct. 1419, 18 L.Ed. 2d 488 (1967). Although plaintiff Benazet is not a longshoreman, the Supreme Court's reliance in *Jackson* on its expansive grant of the benefits of the seaworthiness doctrine to a wide range of maritime employees combined with its announced desire to avoid a 'harsh and incongruous result' leads us to conclude that *this plaintiff would probably be entitled to maintain a suit based on unseaworthiness of the carfloat owned by his employer Erie.*" 315 F.Supp. at 364, ftne 4. (Emphasis added)

Thus, the district court in *Atlantic* assumed that the party against whom contribution was sought was *not* immune by statute from direct suit by the plaintiff. The district court's reading of the effect of *Jackson v. Lykes* upon *O'Rourke* is correct and is further supported by *Reed v. Steamship Yaka*, 373 U.S. 410 (1963). The *O'Rourke* case was a 5-4 decision, with Justices Warren, Black, Clark and Minton dissenting. The decision was written by Justice Reed, who was one of the dissenters in *Halcyon*. Justice Black's view became the majority, however, and he wrote the decisions in *Jackson v. Lykes* and *Reed v. Steamship Yaka*, with Justices Stewart and Harlan dissenting. Although *O'Rourke* has never been expressly overruled by this Court, it has not been cited by this Court since *Reed v. Steamship Yaka*, and it is obvious that the views of the minority in *O'Rourke* became law in the later decisions.

This Court need not overrule *O'Rourke* in order to reach the result urged by petitioner. By the same token, however, *O'Rourke* need not be expanded in such a way as to undermine the legitimate breadth of *Atlantic*. A fair reading of all of the decisions of this Court culminating in *Atlantic* leads to the inescapable conclusion that the *Atlantic* case means exactly what it says: "There is no right of contribution in noncollision admiralty cases" — irrespective of the right of the plaintiff to bring a direct action against the party against whom contribution is being sought. The Fifth Circuit's attempt to distinguish *Atlantic* on the basis of *Horton* and *Watz*, flies in the face of both the precise holding in *Atlantic* and the underlying rationale of both *Atlantic* and *Halcyon*. Thus the district court, in this non-collision admiralty case, erred in granting contribution.

- B. *This Court should not overrule Halcyon and Atlantic and create a new cause of action for contribution in this case.*

This Court's decision in the *Halcyon* case was not based upon blind adherence to the rule against contribution among joint tort-feasors. Instead, it was a carefully reasoned decision based upon sound principles of jurisprudence. As we have already seen, the rationale of the *Halcyon* case was that, considering the pervasive legislative activity in this area of the law:

"... it would be unwise to attempt to fashion new judicial rules of contribution and that the solution to this problem should await congressional action."
342 U.S. at 285.

Since the unanimous decision of this Court in *Atlantic* only two years ago was expressly based "on the authority of *Halcyon*," one can only conclude that this Court recognized only two years ago the continuing vitality of the grounds of the *Halcyon* decision.

Developments since *Atlantic* have, if anything, verified the principle that this area of the law is most appropriately left to the Congress for development.

In 1972 the Congress did adopt substantial changes in the Longshoremen's and Harbor Workers' Compensation Act.* The 1972 Amendments substantially increased the benefits available to injured workers. In return, Section 18(a) of the 1972 Act amended Section 5(a) of the Act (33 U.S.C. § 905) in a manner which significantly lessened the rights of an injured longshoreman to recover damages from the vessel by eliminating the unseaworthiness remedy and further provided that "the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void." The legislative process which led to the enactment of the 1972 Act, as clearly reflected in its legislative history (see, e.g., House Report No. 92-1441, 3 U.S. Cong. & Adm. News '72, at 4701-4705), involved just the sort of interaction of "many groups of persons with varying interests" spoken of in *Halcyon*, and the Congressional action involved "a fair accommodation of the diverse but related interests of these groups." *Halcyon, supra*, at 286. The Act was a painstakingly worked out compromise between the interests of the injured workers, vessel owners, stevedores and shipyards. Congress can be presumed to have enacted this legislation with full appreciation of this Court's decisions in *Halcyon* and *Atlantic*, and thus this Court and the lower courts should be even more reluctant now to intervene in this area of substantial statutory involvement. Cf. *Flood v. Kuhn*, 407 U.S. 258 (1972); *Apex Hosiery v. Leader*,

* Even if those amendments had become effective before this accident, the outcome of this case would not have been directly affected by the Act, since the plaintiff recovered against the vessel for negligence, and the vessel's indemnity/contribution claim against the Mobile stevedore was not against an "employer" under the Act.

310 U.S. 469, 487-9 (1940); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 15-18 (1941); *Joseph v. Carter & Weekes Co.*, 330 U.S. 422, 428 (1947); *Walling v. Halliburton Oil Well Cementing Co.*, 331 U.S. 17, 25-26 (1947).

The 1972 Amendments were enacted against the backdrop of the *Halcyon* rule, which denied contribution, and the *Ryan* rule, which granted a right of indemnity for breach of an implied warranty of workmanlike performance. These twin judicial doctrines saw substantial elaboration and refinement over the twenty years between *Halcyon* on the one hand and *Atlantic* and the '72 Amendments on the other. The *Ryan* principles of implied warranty have been extended by the courts to cover many relationships other than that between vessel and employing stevedore and vessel and employing shipyard. See, e.g., *Dunbar v. Henry DuBois' Sons Co.*, 275 F.2d 304 (2nd Cir. 1960); *Whisenant v. Brewster-Bartle Offshore Company*, 446 F.2d 394 (5th Cir. 1971). A right of indemnity has been granted for breach of implied warranty even in the absence of privity of contract. See, e.g., *Whisenant v. Brewster-Bartle*, *supra*.

Thus Congress, in its carefully worked out compromise between competing economic forces, has prevented this Court from creating a right of contribution (as well as indemnity) in favor of vessels against the employers of injured workers. Thus the *Halcyon* holding, on the facts before the Court in that case, has been codified by Congress in the 1972 Amendments to the United States Longshoremen's and Harbor Workers' Compensation Act.

What has been left untouched by the Congress in the 1972 Amendments are maritime relationships not governed by those Amendments. Even had the accident giving rise to this case occurred after the effective date of the 1972 Amendments, those Amendments would not have abolished

the vessel's indemnity claim against Cooper because Cooper was not an "employer" under the Act. Any further changes in those relationships should also be left for Congressional action. That teaching of *Halcyon* is more true now than in 1952.

It will no doubt be argued, however, that a rule which disallows contribution among joint tort-feasors is a discredited relic of the past based upon the long-abandoned notion in the tort law that one should not be able to profit from his own wrong. It may be argued that courts are far more free in admiralty to create new law than in other areas. Such arguments may draw superficial support from this Court's decision in *Moragne v. States Marine Line, Inc., et al*, 398 U.S. 375 (1970). Upon close examination, such arguments fall far short of compelling rejection of the continuing wisdom of *Halcyon*.

First, it is not altogether clear that the rule against contribution among joint tort-feasors is unjust. Powerful arguments in favor of the rule have been advanced by leading scholars in this area. See James, "Contribution Among Joint Tort-Feasors: A Pragmatic Criticism," 54 *Harv. L. Rev.* 1156 (1941); Note, 68 *Yale L.J.* 1964 (1959). As the Court pointed out in *Halcyon*, "Courts exercising a common law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors." 342 U.S. at 285. This has long been the rule in federal courts. *Union Stockyards Co. v. Chicago, B. & Q.R.Co.*, 196 U.S. 217 (1905). The arguments over the relative merits of contribution have persuaded the courts in only nine American jurisdictions to allow contribution without legislation and have persuaded the legislatures of only twenty-three states to allow contribution in one form or another by statute.

Prosser, *Law of Torts* (4th Ed. 1971), 306-8. Thus, the states are closely divided on relative merits of a rule which allows contribution.

The situation confronting this Court in *Moragne* was much different. First, the Court in *Moragne* was faced with a common law rule (which did not allow a recovery for wrongful death) which had been rejected unanimously by the state legislatures and by numerous federal statutes. *Moragne, supra*, at 390. Here the Court is faced with a sharp division over the merits of the existing common law rule.

Second, in *Moragne*, the Court overruled *The Harrisburg*, 119 U.S. 199 (1886), an 84-year-old precedent, in contrast to the situation here where the Court is being asked to overrule a case only 22 years old which was expressly reaffirmed only 2 years ago.

Third, one of the underlying principles that led to the Court's decision in *Moragne* was the special solicitude that admiralty courts have for the maritime worker. *Moragne, supra*, at 387. That consideration is either inapplicable here, where the problem is one of allocation between those whose torts have injured maritime workers, or points toward reaffirming the rule against contribution in non-collision cases. As Professor James has pointed out, the rule which allows contribution frequently works against the interests of the injured plaintiff. See *James, supra*, at 1160-1165.

Fourth, in *Moragne*, the Court corrected what had become a lack of uniformity in admiralty law. An underlying theme of admiralty, and one of the reasons for the existence of a separate body of admiralty law, is the desirability for uniform principles to govern maritime activities throughout the United States. *The Harrisburg, supra*,

through *The Tungus v. Skovgaard*, 358 U.S. 588 (1959), had spawned a development which allowed persons killed by unseaworthiness in state territorial waters to recover in many states [e.g., Texas; see *Vassallo v. Nederl-Amerik Stoomv Maats Holland*, 344 S.W. 2d 421 (Tex.S.Ct. 1961)] but not in others such as Florida. *Moragne*, *supra*, at 395-402. The Court said:

"Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. E.g., *Hess v. United States*, 361 U.S. 314 (1960); *Goett v. Union Carbide Corp.*, 361 U.S. 340 (1960). Such uniformity not only will further the concepts of both of the 1920 Acts, but will also give effect to the constitutionally based principle that federal admiralty law should be 'a system of law co-extensive with, and operating uniformly in, the whole country.' *The Lottawanna*, 21 Wall, 558, 575 (1875)." 398 U. S. 401-2.

In contrast, in this case the Court is not faced with a lack of uniformity in admiralty law, except to the extent that recent decisions of the Second and Fifth Circuits conflict with *Halcyon*, *Atlantic* and decisions in other circuits. In *Moragne* it was necessary to overrule *The Harrisburg* in order to assure uniformity; here uniformity may be assured by reaffirming *Halcyon* and *Atlantic*.

Fifth, the decision in *Moragne* rested in large measure upon the reasoning that judicial recognition of a right of recovery for wrongful death in the general maritime law effectuated Congressional policies reflected in various federal death statutes. *Moragne*, *supra*, at 393-403. In contrast, as we have already seen, overruling *Halcyon* and *Atlantic* at this point would run counter to the Congressional policy

expressed in the 1972 Amendments to the United States Longshoremen's and Harbor Workers' Compensation Act, enacted as they were against the backdrop of *Halcyon*, *Ryan* and *Atlantic*.

Finally, the Court must consider, as it did in *Moragne*, whether a compelling showing has been made that prior decisions should be overruled. As the Court said:

"Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors." 398 U.S. at 403.

Here the weighing of all the relevant factors clearly points toward reaffirmance of *Halcyon* and *Atlantic*. Unlike the rule in *The Harrisburg*, the *Halcyon* rule did not rest "on a most dubious foundation when announced, . . ." 398 U.S. at 404. *Halcyon* has not "become an increasingly unjustifiable anomaly as the law of the years has left it behind," nor has it "produced litigation spawning confusion in an area that should be easily susceptible of workable solutions." *Ibid*. Unlike the situation in *Moragne*, the *Halcyon* rule has provided a foundation which has enabled the maritime industry "to predict the legal consequences of [its] actions," and has facilitated "the planning of primary activity," and encouraged "the settlement of disputes without

resort to the courts." 398 U.S. at 403. In *Moragne* the Court correctly pointed out:

"Shipowners well understand that breach of the duty to provide a seaworthy ship may subject them to liability for injury regardless of where it occurs, and for death occurring on the high seas or in the territorial waters of most states. It can hardly be said that shipowners have molded their conduct around the possibility that in a few special circumstances they may escape liability for such a breach." 398 U.S. at 404.

In contrast, the rule denying contribution does provide a clear guide for the planning of activities in the maritime sphere. It must be recognized that in the overwhelming majority of conceivable circumstances under which a right of contribution might be asserted in an accident arising out of maritime activities, the relationship between the putative tort-feasors is consensual. If not actually controlled by express contract, such relationships are frequently controlled by implied agreements, or, in the very least, are potentially susceptible of being governed contractually. The major maritime exception to such a consensual relationship is the ship collision, where, as the *Halcyon* case recognized, there has long been a rule of contribution via the divided damages rule. The law as it presently stands, which allows a right of indemnity for breach of implied warranties of workmanlike performance (except where the relationship between the parties is governed by the United States Longshoremen's and Harbor Workers' Compensation Act) but denies contribution, allows the parties and their underwriters to plan their activities accordingly.

It has long been recognized that perhaps as in no other field of human endeavor maritime risks are covered by various forms of insurance. See Gilmore & Black, *Law of Admiralty*, p. 48 et seq. Such insurance is tailored to existing substantive rules, and parties contract with reference to those rules. Thus many maritime activities are governed by contracts containing elaborate indemnity and insurance

provisions which allocate the various risks and responsibilities among the parties. Bargains made between contracting parties entering into such agreements, and the decisions of parties at times not to enter into such arrangements, has been dictated in no small measure by the underlying rules which are before the Court in this case.

The case at bar provides the Court a striking demonstration of the inadvisability of disregarding the firm precedent of *Halcyon*. Plaintiff, Troy Sessions, an injured longshoreman, sued the vessel on which he was working. He did not sue Petitioner Cooper, although he could have, since Cooper was not his employer. No doubt his counsel felt that the doctrine of unseaworthiness provided a strong case against the ship, and, as a matter of tactics, he did not want to clutter his case by bringing an action for negligence against Cooper. The same tactical considerations have led some commentators to argue that allowance of contribution is disadvantageous to plaintiffs. See, James, *supra*. The vessel then brought an action for indemnity, based upon familiar *Ryan* principles, against both the Houston stevedore which employed the plaintiff and against Cooper. The ship did not bring an action for contribution against either stevedore, and neither stevedore brought cross-actions against the other for contribution. The reasonable expectation of all of the experienced maritime lawyers involved in the litigation was that there was no such right of contribution, and thus no reason to assert any such action. It was not until the district court allowed contribution, that a hopelessly tangled mess was created. Thus it was not the *Halcyon* rule but the action of the district court that "produced litigation-spawning confusion in an area that should be easily susceptible of more workable solutions." *Moragne*, at 404. Indeed, not only did Cooper appeal, but so did the vessel on the grounds that the district court should not have denied its indemnity claim. The Fifth

Circuit properly affirmed the district court's denial of indemnity, and under accepted principles the matter should have rested there.

The relationship between the vessel and Cooper was contractual. Their relationship was planned with reference to existing rules which, under some circumstances, might impose liability upon Cooper to indemnify the vessel with respect to accidents occurring in subsequent ports. But Cooper did not plan its activities in contemplation of potential liability for *contribution* with respect to accidents in subsequent ports. Thus, in an industry where risks are almost always insured against, Cooper in this case has no insurance which covers the judgment of contribution obtained against it. Thus the second fear of Professor James in arguing against contribution is realized also in this case, namely that it has been used in an instance "in which an insurance company or a large self-insurer seeks it against an uninsured individual; . . ." James, *supra*, at 1169.

A final consideration against creating in this case a new cause of action in non-collision admiralty cases is the difficulty which will be faced by this Court and the lower courts in coming years in defining the nature of the right of contribution. Contribution statutes take a variety of forms, and it has been pointed out that "the drafting has not been free from difficulty." *Prosser, supra*, at 307-8. In *Moragne* the Court felt that problems in the wrongful death area would not be great because "in most respects the law applied in personal injury cases will answer all questions that arise in death cases." *Moragne* at 406. As the Court pointed out, future litigation could be guided by the generally consistent provisions of existing federal statutes allowing wrongful death recoveries. Even with such guidance, however, the Court has recently been sharply divided on the measure of damages in such actions. See, *Sea-Land Services, Inc. v. Gaudet*, 42 L.W. 4168 (January 21, 1974).

With respect to contribution, however, courts will be provided with significantly less guidance than in the wrongful death area. Existing doctrines of maritime law point to inconsistent conclusions, since in collision cases divided damages applies but in personal injury cases comparative negligence applies. Thus, is the right of contribution to be 50%, or is it to be equitably apportioned according to fault?

Other problems also exist. What statute of limitations controls and when does it begin to run? How are the rights to be determined when one tort-feasor settles with the injured person? What effect shall be given to the tort-feasor with an individual defense or immunity, whether by decisional law or statute, with respect to actions by the plaintiff? How will such a rule of contribution be coordinated and reconciled with existing doctrines of indemnity? With respect to the latter question, for instance, what rule controls when both tort-feasors are negligent but one has breached a warranty of workmanlike performance to the other which would normally give it a right to indemnity? Or, what happens in the situation where A and B are jointly negligent tort-feasors, and B has breached a warranty of workmanlike performance, but A has been guilty of conduct which under existing doctrines would preclude indemnity? See, *Weyerhaeuser S.S. Co. v. Nacirema Operating Co., Inc.*, 355 U.S. 563 (1958); and compare *Waterman S.S. Corp. v. David*, 353 F.2d 660 (5th Cir. 1965) cert. denied, 384 U.S. 972, with *Southern Stevedoring & Contracting Co. v. Hellenic Lines Ltd.*, 388 F.2d 267 (5th Cir. 1968). Some of the difficulties of fashioning rules of contribution are discussed in *Prosser, supra*, at 308-310, but that discussion does not even deal with the unique difficulties of this problem in the maritime field.

In sum, *Halcyon* and *Atlantic* compel reversal in this case. Those decisions should not be overruled.

II.

IF *HALCYON* AND *ATLANTIC* ARE THOUGHT TO BE INAPPLICABLE, OR IF THEY ARE TO BE OVERRULED, CONTRIBUTION SHOULD STILL NOT BE ALLOWED IN THIS CASE.

Petitioner reluctantly addresses itself to this alternative argument. It is obviously most difficult to argue that one's client should not be held liable under a rule of law which, in substance, does not exist. Normally, a litigant argues that, under some recognized body of law, it is not liable, and issue is joined on how that body of law applies in the case before the court.

One is tempted to follow one of two courses of action. First, this whole section of the brief could be omitted on the firm conviction that *Halcyon* and *Atlantic* clearly control and should not be overruled. Indeed, one is a bit timid about writing a brief on the assumption that this Court may overrule or render meaningless a decision only two years old. Second, one is tempted to dismiss the whole problem by asking the Court, in the event that *Halcyon* and *Atlantic* are either found to be inapplicable or to be overruled, simply to reverse and remand the case to the district court to consider afresh the case as a contribution case, giving the parties the right to develop both the facts and the law further. Such an approach is most tempting in this case because no one conceived of the case as one for contribution until the district court announced its findings from the bench. Neither the district court nor the Court of Appeals really examined whether this was a proper case for contribution.

Thus it is with some reservations that the following arguments are even advanced. Petitioner submits that even if there is a rule which allows contribution among joint

tort-feasors in non-collision admiralty cases, and whatever the outlines are of such a cause of action, this is not a proper case for contribution.

A. Respondent cannot recover contribution against petitioner because respondent has already been fully indemnified; it has not suffered any damages.

After the vessel was sued by the injured longshoreman, it filed third party actions against petitioner, Cooper, and against Mid-Gulf, the Houston stevedore which employed the plaintiff. Immediately prior to trial, Mid-Gulf made an agreement with the vessel agreeing to indemnify it against any recovery which might be made by the plaintiff. (A. 119) Mid-Gulf did not take an assignment of the vessel's claim against Cooper, but instead simply took over the defense of the case brought against the vessel by the plaintiff. Mid-Gulf was dismissed, and its counsel was substituted as counsel for the vessel. Damages that the plaintiff recovered against the vessel were, pursuant to that agreement, satisfied by funds from the liability insurance carrier for Mid-Gulf.

Having been fully indemnified by one stevedore, the vessel no longer has a cause of action either by way of contribution or indemnity to assert against petitioner because there is no way the vessel in its own capacity could have been responsible for any damages by virtue of the plaintiff's claim.

The legal principles involved are fundamental. In tort law where the injured party receives full satisfaction from one of two joint tort-feasors, that releases the other tort-feasor. Prosser, *Law of Torts* (4th Ed. 1971) Secs. 48 and 49. In contract law where two parties are jointly obligated to another, performance by one discharges the other. 4

Corbin, *Contracts*, Secs. 935, 936. Obviously, it would be inequitable for the vessel in its own right to make a double recovery. To prevent a double recovery, the courts of the Fifth Circuit have fashioned a rule under which a plaintiff who settles with one of two defendants liable to him must credit against damages recovered from the second defendant any amount received in settlement from the first defendant. See *Billiot v. Sewart Seacraft, Inc.*, 382 F.2d 662 (5th Cir. 1967); *Loffland Bros. Co. v. Huckabee*, 373 F.2d 528 (5th Cir. 1967). Applying that principle to this case, since the vessel has received 100% satisfaction from Mid-Gulf, it must give petitioner Cooper 100% credit for any amounts that it would be otherwise obligated to pay the vessel by way of contribution.

- B. *The vessel should not be allowed to recover contribution from Cooper because the vessel in its pleadings and its contentions in the pretrial order did not seek contribution.*

The vessel filed a third party complaint against Cooper seeking indemnity, not contribution. (A. 7) The grounds for seeking indemnity as alleged in the complaint was "the failure of Cooper Stevedoring Company, Inc. to perform its *contractual obligations* owed defendant-third party plaintiff, and by reason thereof Cooper Stevedoring Company, Inc. is *liable to indemnify* defendant-third party plaintiff for any damages that it may be required to pay because of the complaint filed herein by plaintiff, . . ." (A. 7) (Emphasis supplied) The vessel prayed only for "judgment over and against third party defendant for *all of its damages*, . . ." (A. 7) In the pretrial order the vessel did contend that both stevedores were negligent and that such negligence "will entitle the [vessel] to recover indemnity from the" stevedores. (A. 9-10) The vessel also

alleged that the stevedores "breached their contractual obligations" and that "such breach entitles the [vessel] to recover full indemnity from the" stevedores. (A. 10) The vessel sought indemnity only, not contribution. Thus the issue of contribution was not before the court, and Cooper was not fully or fairly apprised that any claim of contribution would be made.

- C. *Petitioner Cooper did not violate any duty it owed to the vessel, nor was it held liable to the plaintiff; thus, contribution should not be allowed.*

The plaintiff did not sue Cooper (see Pretrial Order and Plaintiff's Second Amended Original Complaint, A. 8-15 and 1-3), although there was no reason why he could not have. The plaintiff's only claim was against the vessel. The plaintiff prevailed upon that claim upon findings of unseaworthiness of the vessel and negligence of the shipowner and charterer. Thus the vessel was a tort-feasor vis-a-vis the plaintiff. But Cooper was not found to be a tort-feasor vis-a-vis the plaintiff, and there is no finding that Cooper breached any duty to the plaintiff. Thus under contribution rules as developed in many jurisdictions contribution should be denied. See *Prosser, supra*, at 307 and cases collected in footnote 61. In *American Mutual Liability Insurance Co. v. Matthews*, 182 F.2d 322 (2nd Cir. 1950), the Court said:

"For a right of contribution to exist between tortfeasors, they must be joint wrongdoers in the sense that their tort or torts have imposed a common liability upon them to the party injured. In the case at bar the shipowner and the stevedoring firm were not under a common liability to the injured employee, nor were they joint wrongdoers. His claim against his employer was not for damages, as was his claim against the shipowner, nor was it dependent upon any tort com-

mitted by his employer. Consequently the shipowner can have no right to contribution based on the theory that they were joint tort-feasors."

By the same token, petitioner Cooper did not violate any duty it owed to the ship. An examination of the record is necessary in order to demonstrate this point fully. When the cargo was loaded in Mobile, the undisputed evidence was that the super cargo employed by the vessel gave directions to Cooper concerning how the cargo was to be secured. (A. 152) A representative of Cooper testified that the longshoremen in Mobile attempted to fit the crates as closely together as possible, but that it was not humanly possible to make the tops of the crates absolutely snug against each other and not absolutely possible to prevent some cracks of a few inches between the crates. (A. 148-154) In that connection, the witness testified:

"Q. Now, was your company asked to make any special preparations to cover over this cargo so that it would be fit and ready to have other cargo stowed on top of it and be safe for the men to work on it?

A. No, sir." (A. 154)

. . .

"Q. (By the court) All right. Who determines where and how things are to be stowed?

A. The super cargo for Alcoa Steamship Company, in this case. I mean, it varies in different cases, but this particular one, the super cargo for Alcoa Steamship Company lays the ship out." (A. 155-156)

. . .

"Q. What responsibility, if any, does the ship have?

A. The chief officer, he supervises the stowage of the cargo all the time. He's on the deck looking down to see that everything is going properly.

Q. And he, the chief officer, knows how and where the cargo is stowed?

A. Yes." (A. 156)

. . .

The witness had earlier testified as follows:

"Q. Who decides whether or not a partially filled hatch with cargo shall or shall not be secured? Who makes that decision?

A. In the case of—in this particular case, Alcoa Steamship Company is involved, the super cargo for Alcoa would tell me whether he wants it secured or not.

Q. Who?

A. The super cargo representing Alcoa.

Q. All right. In other words, the shipowner?

A. Mr. Smith [attorney for ship and charterer]:

That's the charterer your Honor.

Q. [By Mr. Brock] The charterer of the ship?

A. That would come through the chief officer and the super cargo for Alcoa.

Q. And the chief mate, is that who you're talking about?

A. Chief mate.

Q. And they are the ones that would tell you whether to secure it or not?

A. That's correct." (A. 152)

This testimony is important because it is the only testimony in the record concerning the relationship between the vessel and Cooper. It leads to only one conclusion, namely, that the vessel determined whether or not to dunnage the cargo and whether or not to secure it. This is significant, in turn, because it relates to some of the stated grounds of negligence and unseaworthiness which formed the basis

of the plaintiff's recovery against the vessel. The district court found:

"Some types of arrangement should have been conducted to assure that the stow would not, in its trip from Mobile to Houston, move so as to leave spaces between the crates and/or some type of dunnage should have been put on top of the stow, because it was obvious to everyone that in order to get down into the hold to stow other cargo, which it was obvious that other cargo was going to be stowed in that hold, you would have to walk over crates that were stowed there. Consequently, the manner and method in which it was stowed brought about an unsafe place to work and brought about an unseaworthy condition on the part of the KARINA.

"That Cooper Stevedoring Company was responsible for the stowage and that they were negligent in not stowing this cargo in a manner and method in which people could safely walk on top of them, because it was obvious that other longshoremen in other ports would have to work on top of them" (A. 163-164)

The court then said, however, that:

"It is difficult from this evidence for the court to evaluate exactly the responsibility between the shipowner on the one hand and Cooper on the other."

Apparently the trial court had forgotten the other evidence on this subject which is quoted above. That evidence shows that as between the vessel and Cooper, with respect to the unseaworthy conditions noted, that it was the duty of the vessel to request Cooper to dunnage off on top of the cargo it stowed; it was the duty of the vessel to request Cooper to do any securing that the ship thought proper; and that at the conclusion of the stowage, the vessel inspected the stowage and advised Cooper that it was satisfactory. (A. 149)

Another factual basis for the finding of unseaworthiness of the ship was the existence of the piece of paper which obscured the crack between the crates. The district court said:

"The paper itself and the place on which it was, brings about an unsafe condition in that it hid the space through which Mr. Sessions' foot slipped." (A. 165)

But Cooper breached no duty to the vessel with respect to the presence of the paper which rendered the ship unseaworthy, because under the express findings of the court, reiterated on at least three occasions, the court was unable to determine where the paper came from. (A. 165)

Cooper surely cannot be held liable to the vessel for contribution on the basis of speculation and conjecture about the paper, since the only evidence concerning Cooper's relationship to the paper demonstrates that Cooper did not put the paper on board. A witness for Cooper testified that in connection with the loading of the crates there would be no need for separation paper. (A. 149) Further, he testified that when separation paper was used in Mobile, brown Kraft paper was used rather than white paper; he never used any white paper. (A. 150) He further testified that he inspected the stowage upon completion of the job in Mobile, and that he did not notice any white paper in the hold, although "I believe I would have seen it, something as glaring as white paper." (A. 152) The President of Cooper testified that no separation paper was needed for this cargo. If separation paper is required, Alcoa furnishes it. (A. 136) To his knowledge, his company had never used any white paper for separation or for any other purposes. (A. 140)

If Cooper's action were negligent, it may have been potentially liable to the plaintiff, but, because of the relationship between Cooper and the vessel, Cooper should

not be held liable to reimburse the ship for one-half of the liability adjudged against the ship in favor of the plaintiff.

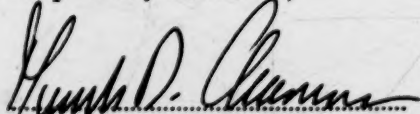
- D. *Even if there is a right of contribution in non-collision admiralty cases, it should not be applied to parties whose rights and obligations are determinable under existing indemnity rules.*

Whatever the nature of any new cause of action for contribution in non-collision admiralty cases, the boundaries of that cause of action should exclude attempts to apportion damages between parties who stand in a contractual relationship. The risks between such parties should be allocated in accordance with their contractual understandings and the well-developed law of indemnity following *Ryan*. Application of those rules to this case results in denying indemnity to the vessel because the vessel was guilty of conduct sufficient to preclude indemnity.

CONCLUSION

This Court should reverse the United States Court of Appeals for the Fifth Circuit and render judgment on behalf of petitioner that respondent take nothing from petitioner. Such a result is dictated by *Halcyon* and *Atlantic*, and those decisions should not be overruled. In the alternative, if *Halcyon* and *Atlantic* are inapplicable or are overruled, the Court should still reverse and render in favor of petitioner because respondent is not entitled to contribution from petitioner.

Respectfully submitted,



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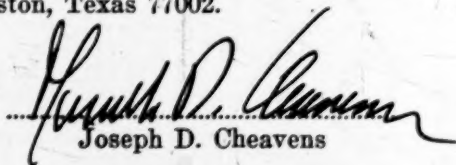
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CERTIFICATE OF SERVICE

On this the 21 day of February, 1974, a true and correct copy of the foregoing Brief for Petitioner was personally delivered to counsel for respondents, Messrs. Dixie Smith and H. Lee Lewis, Jr. of Fulbright & Crooker, Bank of the Southwest Building, Houston, Texas 77002.


.....
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IN THE
Supreme Court of the United States
October Term, 1973

NO. 73-726

COOPER STEVEDORING COMPANY, *Petitioner*

v.

FRITZ KOPKE, ET AL, *Respondents*

BRIEF FOR RESPONDENTS

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IN THE
Supreme Court of the United States
October Term, 1973

NO. 73-726

COOPER STEVEDORING COMPANY, *Petitioner*

v.

FRITZ KOPKE, ET AL, *Respondents*

BRIEF FOR RESPONDENTS

To The Honorable The Chief Justice and The Associate Justices Of The Supreme Court Of the United States:

The opinions of the Courts below and the statement of the grounds of jurisdiction of this Court are adequately presented in the Brief for Petitioner.

STATUTES INVOLVED

Section 5 of the Longshoremen's and Harborworkers' Compensation Act, 44 Stat. 1426 (1927), 33 U.S.C. §905 (1970), provides:

"Exclusiveness of liability

"The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

QUESTIONS PRESENTED

1. In a maritime personal injury case, is there a right of contribution among joint tortfeasors who share a common liability to the injured party?
2. Should damages be evenly divided between a shipowner and a stevedoring contractor where their joint negligence has contributed in equal proportions to cause the loss?

STATEMENT OF THE CASE

This case originated as an action in admiralty by Troy Sessions for damages for personal injuries sustained by him while in the course of his employment as a long-

shoreman aboard the SS KARINA, a vessel then owned and operated by Fritz Kopke, Inc., and under charter to Alcoa Steamship Company (hereinafter collectively referred to as "the Vessel"). The KARINA then lay upon navigable waters at the Port of Houston, Texas, and the suit was brought in admiralty.

The Vessel brought a third party action against the stevedoring contractor which was Sessions' employer on the occasion in question, Mid-Gulf Stevedore, Inc. (hereinafter "Mid-Gulf"). It brought another third party action against Cooper Stevedoring Company (hereinafter "Cooper") the stevedoring contractor which had previously loaded, at the Port of Mobile, Alabama, the cargo over which Sessions was working on the occasion of his accident. In both third party complaints, the Vessel contended that, if it should be shown to be liable to Sessions, it would be because of negligence attributable to the third party defendant or because of an unseaworthy condition which the latter caused or created.

The incident made the basis of this suit occurred on July 2, 1969, while the KARINA was docked at the Port of Houston. Sessions and other longshoremen in the employ of Mid-Gulf began loading sacked cargo in the ship's number one hatch at 10:00 a.m. and were the first longshoremen to enter that hatch since the ship's arrival in Houston. Within that hatch they found a tier of palletized crated cargo, consisting of fire bricks and furnace liner, which had been previously loaded and stowed at Mobile on June 28, 1969, by employees of Cooper. The Houston longshoremen had to utilize the top of this tier of crates as a flooring on which they walked and stowed the Houston cargo. It was while walking atop this previously stowed cargo and carrying a sack weighing

about 100 pounds that Sessions stepped into an opening between the crates and thereby sustained his injuries. The opening or gap into which he stepped was concealed by a piece of white, corrugated paper, which was approximately ten feet long and three to four feet wide.

Prior to trial, the Vessel entered into a compromise and settlement of its third party action against Mid-Gulf, which was then dismissed from the case. Subsequently, the attorneys which had previously represented Mid-Gulf were substituted as counsel for the Vessel. However, contrary to petitioner's representation in its brief that Mid-Gulf "took over the defense of the vessel, agreeing to indemnify the vessel fully," the terms of the settlement agreement between the Vessel and Mid-Gulf were never adduced at trial by competent evidence and do not appear of record.

After trial on the merits, the District Court (Singleton, J.), sitting without a jury in admiralty, found that the negligence of Cooper in failing properly to secure the crated cargo so that it would not move and separate during ocean transit, and/or in failing to place some kind of dunnage over the cargo to provide a smooth flooring, brought about the creation of an unsafe condition in the number one hold which was the proximate cause of the plaintiff's injuries. (A. 163-164) It further found that such negligence on the part of Cooper constituted a breach of its implied warranty of workmanlike service. (A. 168) It observed in its findings that Cooper should have foreseen that longshoremen in subsequent ports would have to work over this cargo in completing stowage of the hold. (A. 164) The District Court found that the paper which concealed the hole into which

Sessions stepped was already present in the hold when the Houston longshoremen entered and was not placed there by employees of Mid-Gulf. (A. 164-165) However, the Trial Court was unable from the evidence to make any finding as to how the paper came to be there or who was responsible for its presence. (A. 165)

Contrary to petitioner's representation in its brief, the District Court did not find that the Vessel was precluded by its conduct from obtaining indemnity from Cooper. Rather, the District Court simply announced its opinion that "the ship itself has a responsibility on cargo" and concluded that "the only thing to do is to divide the liability in this case equally" between the Vessel and Cooper. (A. 165) Therefore, the Court entered judgment for Sessions, decreeing that he recover damages from the Vessel and that the Vessel have contribution, in effect, from Cooper for one-half of the damages it was required to pay.

Cooper appealed to the United States Court of Appeals for the Fifth Circuit, and the Vessel cross-appealed from that part of the judgment denying the Vessel full indemnity. The Court of Appeals affirmed the District Court, construing the District Court's findings as a determination that the Vessel's conduct precluded its "full recovery" on the indemnity claim for breach of Cooper's warranty and that contribution between the vessel and Cooper as joint tortfeasors was therefore proper. (A. 20)

SUMMARY OF ARGUMENT

Division of damages among parties whose concurring fault has caused the loss is, and has always been, the rule

in admiralty. For a century this Court and the lower courts have repeatedly recognized contribution among joint tortfeasors as a substantive right in every case of maritime tort founded upon negligence, without distinction between those cases involving ship collisions and any other case where there is negligence in the party suing. This Court has recognized no exception to the rule, except that it has declined to fashion a rule of contribution in the context of cases where the wrongdoer against whom contribution is sought is immune by statute from liability for his tort, as in the case of an employer who is shielded by a workmen's compensation statute from any liability based upon fault for injury to his employees. The lower courts have properly understood this distinction and have continued to apply the rule of contribution in maritime personal injury and property damage cases where there is common liability of multiple tortfeasors to the injured party.

Adjustment of the rights and obligations among diverse parties and interests in the field of maritime commerce has been primarily a judicial concern in modern times, and this Court has assumed the role of principal policy maker in defining the rights *inter se* between shipowners and stevedores and other analogous relationships. It is therefore the proper concern of this Court, and in the interest of uniformity and continuity in the law admiralty, that the equitable and reasonable maritime doctrine of comparative fault be applied without exception, save only in that narrow class of cases involving statutory immunity of the party against whom contribution is sought.

Contribution is clearly proper in the present case, since both the Vessel and Cooper were potentially liable

and vulnerable to suit by Sessions, and since the District Court found that the joint negligence of each contributed in equal proportions to cause Sessions' injuries and damages.

Since the parties in this case stand in the special contractual relationship of shipowner and stevedore, the applicability of rules of contribution must be reconciled with the special rules of indemnity which the courts have traditionally applied in that context. This Court has recognized that a shipowner may recover its full indemnity where damages result from an improper or unworkmanlike performance by a stevedore, notwithstanding any concurrent fault on the part of the shipowner which is not sufficient to prevent the stevedore from discharging his implied warranty of workmanlike service. If the present case is to be decided strictly on an implied indemnity basis, then the Vessel is entitled to recover full indemnity from Cooper.

On the other hand, this Court has also apportioned damages on a comparative fault basis between parties standing in a contractual relationship. Since the all-or-nothing indemnity approach was fashioned largely to circumvent the impediment to contribution posed by a stevedore's statutory immunity from liability for his employee's injuries, and since that problem does not exist in the present case, the Court could justifiably adopt a modified indemnity approach which would limit the shipowner's recovery on the stevedore's breach of warranty to those damages not caused by the former's own negligence. On that basis, the judgments below awarding contribution in the present case should be affirmed.

ARGUMENT

I.

CONTRIBUTION HAS HISTORICALLY BEEN A SUBSTANTIVE RIGHT IN EVERY CASE OF MARITIME TORT FOUNDED UPON NEGLIGENCE AND PROSECUTED IN ADMIRALTY.

As a matter of historical fact, Cooper is clearly mistaken in claiming that "there is no right of contribution among joint tortfeasors in admiralty," (Brief for Petitioner, p. 6) and indeed elsewhere concedes that "[i]n collision cases there has long existed a rule of contribution through the divided damages rule * * *." (Brief for Petitioner, p. 8). However, Cooper contends for the stricter proposition that the rule of divided damages does not apply except in those classes of cases concerned with fixing responsibility where two vessels collide. In point of fact, it can be demonstrated that the general applicability of the rule, without any such distinction, has been repeatedly recognized by this Court for a century.

It is true that the divided damages rule finds its historical origin in the context of ship collision cases, where it is established admiralty doctrine that "where both vessels are in fault, they must bear the damage in equal parts, the one suffering least being decreed to pay to the other the amount necessary to make them equal, which amount, of course, is one-half of the difference between the respective losses sustained." *The North Star*, 106 U.S. 17 (1882). In the case cited, the Court documented many authorities, going back as far as the laws of Oleron and Wisbuy, and continuing down to *The Catherine v. Dickinson*, 58 U.S. (17 How.) 170 (1854). and cases

following it, to show that this has always been the method of apportionment. One writer has traced the history of contribution under maritime law to the thirteenth century ("and there is no reason to suppose it to have been an innovation then"), finding application in varying forms under codes of northern and southern Europe as well as in the Orient, in the Ordonnance of Louis XIV and as applied by the English Admiralty. Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 Cal. L. Rev. 304, 305-310 (1957).

In the United States, the proposition that damages were divided in cases of mutual fault was noticed by this Court in 1843 in *The Louisville*, 42 U.S. (1 How.) 89, 92 (1843), and squarely applied eleven years later in *The Catherine*, 58 U.S. (17 How.) 169, 177 (1854). It had been cited by a lower court as early as 1836. *The States Rights*, 20 Fed. Cas. 201, 208 (E.D. Pa. 1836).

By 1875, this Court had given application to the rule of contribution outside the context of a collision case, where a towing vessel had (without collision) caused damage to its tow. *The Alabama and The Gamecock*, 92 U.S. 695 (1875). See also: *The Virginia Ehrman*, 97 U.S. 309 (1877). Since that time, it may fairly be said, it has been understood by scholars and practitioners alike that in admiralty the rule is general, that "[t]he right to contribution is a consequence of the joint tort and attached to the joint liability," 2 Benedict, *Admiralty* 552 (6th ed. 1940), and the courts have likewise recognized that where "the suit is in the admiralty * * * contribution between joint tortfeasors has existed since 1875." *Barbarino v. Stanhope S.S. Co.*, 151 F.2d 553, 555 (2d Cir. 1945).

Historically, this Court has applied the divided damages rule to cases where a ship strikes a fixed object, such as a pier, e.g., *Atlee v. Packet Co.*, 88 U.S. (21 Wall) 389 (1874), without distinction between an ordinary ship collision and any other case where contributory negligence is found in the party suing. Cargo damages, incurred through the joint fault of ship and stevedore, have been divided according to the rule as far back as the case of *Snow v. Carruth*, 22 Fed.Cas. 724, No. 13144 (D. Mass. 1856), a case expressly approved by this Court in *The Max Morris*, 137 U.S. 1 (1890). This Court has granted contribution between a ship grounded by negligent navigation and a canal company which misrepresented the depth of the water, which joint fault caused damage to a shipper's cargo, *White Oak Transp. Co. v. Boston, Cape Cod & N.Y. Canal Co.*, 258 U.S. 341 (1922), and has affirmed a division of damages in a cargo damage case between an unseaworthy ship and a negligently stowing charterer, *The Nidarholm*, 34 F.2d 442 (1st Cir. 1929), *aff'd* 282 U.S. 681 (1931). The Court has approved a division of damages between wharfinger and vessel owner where a vessel grounds or breaks loose through the fault of both. *Christian v. Van Tassel*, 12 Fed. 884 (S.D.N.Y. 1882), approved in *The Max Morris*, *supra*.

The question of the applicability of the divided damages rule in a personal injury case was first squarely presented to this Court in *The Max Morris*, 137 U.S. 1 (1890). In that case, the district court had allowed recovery to a longshoreman for his loss of wages due to his injury, but denied any recovery for pain and suffering or other consequential damages because of his own contributing negligence, holding that "the practice in admiralty to apportion damages in cases of mutual fault is not strictly con-

fined to collisions and prize causes." *The Max Morris*, 24 Fed. 860 (S.D.N.Y. 1885). The Circuit Court affirmed, relying upon this Court's opinion in *Atlee v. Packet Co.*, 88 U.S. (21 Wall.) 389 (1874), and agreeing with the trial court that "the collision rule for dividing damages can no longer be considered as applicable only to cases involving the rights and responsibilities of parties for colliding vessels." *The Max Morris*, 28 Fed. 881, 886 (C.C. S.D.N.Y. 1886). However, the Circuit Court certified to this Court the question whether the libellant was "entitled to a decree for divided damages." In its opinion, this Court reviewed the precedents in both collision cases and non-collision cases in which damages had been divided, and concluded as follows:

"All these were cases in admiralty, and were not cases of collision between two vessels. They show an amelioration of the common law rule, and an extension of the admiralty rule in a direction which we think is manifestly just and proper. . . . *We think this rule is applicable to all like cases of marine tort founded upon negligence and prosecuted in admiralty, as in harmony with the rule for the division of damages in cases of collision.* The mere fact of the negligence of the libellant as partly occasioning the injuries to him, when they also occurred partly through the negligence of the officers of the vessel, does not debar him entirely from a recovery." 137 U.S. at 14-15 (emphasis added).

Though the Court went on to reserve opinion on whether the damages should be divided equally or proportionally, its language has since been regarded by the lower courts as authority for unequal division, and this Court has recognized the case as authority for "the established ad-

miralty doctrine of comparative negligence." *Socony-Vacuum Oil Co., Inc. v. Smith*, 305 U.S. 424, 429, 431 (1939).

Subsequently it has been established that division of damages according to fault extends to a seaman's or longshoreman's suit for unseaworthiness of a vessel, *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953). Legislative intrusions into the field have created no exceptions. The concept has been incorporated into the seaman's statutory negligence action under the Jones Act, 41 Stat. 1007 (1920), 46 U.S.C. §688 (1958), and in the Death on the High Seas Act, 41 Stat. 537 (1920), 46 U.S.C. §§761-768 (1958), which provides a remedy for wrongful death on navigable waters outside the jurisdictional limits of any state.

The commentators have elsewhere chronicled the lower court decisions applying the rule of divided damages in many other classes of admiralty cases, including those involving tug and tow, foul berth, crowding and swell damage, grounding, stevedore damage to vessels, and service contracts, and in a miscellany of fact situations which serve "to show perhaps that the limit is set only by the tortious propensity of man." Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 Calif. L.Rev. 304, 334 (1957). See generally, Staring, *id.*, pp. 321-334; Allbritton, *Division of Damages in Admiralty—a Rising Tide of Confusion*, 2 Journal of Maritime Law and Commerce 323, 338 (1971).

In view of this historical context, Mr. Justice Holmes observed, in *Erie R. Co. v. Erie & W. Transp. Co.*, 204 U.S. 220, 225 (1907), that notwithstanding the general reluctance of the common law courts to recognize an

enforceable right of contribution, "* * * the admiralty rule in this country is well-known to be the other way. * * *" It clearly appears that divided damages, including contribution among joint tortfeasors, has historically been the rule in admiralty in every case of maritime tort founded upon negligence, whether or not involving a collision of vessels.

II.

THIS COURT HAS NOT CREATED ANY EXCEPTION TO THE ADMIRALTY RULE PERMITTING CONTRIBUTION AMONG JOINT TORTFEASORS, EXCEPT IN THOSE CASES WHERE THE STATUTORY IMMUNITY OF ONE OF THE WRONGDOERS PRECLUDES COMMON LIABILITY FOR THE TORTIOUS ACT.

Notwithstanding the long-established recognition by this and other admiralty courts of the right of contribution among joint tortfeasors, Cooper contends that this Court should now read its prior decisions in *Halcyon Lines v. Haenn Ship Ceiling Corp.*, 342 U.S. 282 (1952), and *Atlantic Coast Line R. Co. v. Erie Lackawanna R. Co.*, 406 U.S. 340 (1972), as disapproving any application of the rule of divided damages outside the context of a case involving the collision of vessels. However, an examination of these holdings refutes any inference of this Court's intention to overrule ten decades of American case law to the contrary.

A. The *Halcyon* case.

In *Halcyon*, this Court considered a case arising out of a longshoreman's suit against a shipowner for per-

sonal injuries received when he was working aboard a vessel. The shipowner brought a third party action against the stevedore company which employed the injured longshoreman, alleging that the stevedore was jointly negligent and claiming contribution from it. The longshoreman was precluded from suing his employer, the stevedore, because of the limited liability accorded the employer by the terms of the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C. § 901, *et seq.* (hereinafter referred to as "the Longshoreman's Act"). At trial, a jury had found that the shipowner's negligence contributed to the plaintiff's injuries in amount of 25% and that the stevedore's negligence contributed in amount of 75%. However, the District Court was of opinion that the "mutual fault" rule of divided damages was applicable and rendered a judgment holding the shipowner and the stevedore each liable for one-half of the plaintiff's damages. 89 F. Supp. 265 (E.D. Pa. 1950). The Court of Appeals agreed that a right of contribution obtained between the shipowner and the stevedore, but held that the stevedore's share could not exceed its statutory liability under the Longshoreman's Act. 187 F.2d 403 (3rd Cir. 1951).

In this Court, the shipowner urged that a judgment be rendered allowing contribution on a comparative fault basis in accordance with the findings of the jury; the stevedore argued for a prohibition of contribution, or alternatively for an equal division of damages.

This Court noted the extensive legislative "inroads on traditional court law" in the area of maritime personal injuries, particularly the Longshoreman's Act, and concluded that it would be "inappropriate" to adopt "the rule

of contribution here urged" because Congress "while acting in the field has stopped short" of doing so. In so declining to fashion a rule respecting division of damages in the case before it, the Court took occasion to observe that the "collision case" rule urged upon it by the parties had never been "expressly applied * * * to non-collision cases" by this Court.

In rendering this observation, the Court intended to distinguish the peculiar facts of the case before it from those presented in any contribution cases which it had previously considered. In a footnote appended to that very sentence, the Court commented that it recognized the fact that lower federal courts had applied the divided damages rule in "non-collision cases," and went on to observe that its own opinion of five years earlier in *American Stevedores, Inc. v. Porello*, 330 U.S. 446 (1947) (reversing on other grounds the judgments below in a maritime "non-collision" personal injury case), had implicitly recognized that on remand "the district court would 'be free to adjudge the responsibilities of the parties' in accordance with the contribution rule announced by the lower federal courts." The Court stated that it did not, however, consider these comments to foreclose the issue presented in the case then before it. *Halcyon*, U.S. at 284, f.n. 5.

Against the historical backdrop, it clearly appears that this Court's decision in *Halcyon* to abstain from any "attempt to fashion new rules of contribution" was prompted by the peculiar situation there presented. In that case, one of the joint tortfeasors, the plaintiff's stevedore-employer, was statutorily shielded from tort liability to the injured plaintiff by the express provisions of the

Longshoremen's Act. 33 U.S.C. § 905. Since it is firmly established that contribution in admiralty arises directly from the tort rather than upon a theory of subrogation, *Erie R. Co. v. Erie & W. Transp. Co.*, 204 U.S. 220, 226 (1907), *American Mut. Liability Ins. Co. v. Matthews*, 182 F.2d 322 (2d Cir. 1950), the commentators (C.f., Staring, *supra*, 305 f.n. 9; Allbritton, *supra*, 326) have argued, and the Courts of Appeals for the Fifth and Second Circuits (C.f., *Horton & Horton, Inc. v. T/S J.E. DYER*, 428 F.2d 1131 (5th Cir. 1970) cert. denied 400 U.S. 993 (1971); *Watz v. Zapata Off-Shore Company*, 431 F.2d 100 (5th Cir. 1970); *In Re Seaboard Shipping Corp. and Moran Inland Waterways Corp.*, 449 F.2d 132 (2d Cir. 1971), cert. denied 406 U.S. 949 (1972), reh. den. 408 U.S. 932 (1972)), have held, that the "prohibition" of *Halcyon* does not apply to a situation where none of the tortfeasors possesses a statutory immunity from tort liability and the injured party could have proceeded against any of the tortfeasors and could have recovered damages from each. Indeed, this interpretation of *Halcyon* has been espoused by the author of the opinion, Mr. Justice Black. Twelve years after he wrote for the Court in that case, he characterized the decision as follows:

"In *Halcyon* * * * we held that the system of compensation which Congress established in the Longshoremen's and Harbor Workers' Compensation Act as the sole liability of a stevedoring company to its employees prevented a shipowner from shifting all or part of his liability to the injured longshoreman onto the stevedoring company, the longshoreman's employer." *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315, 325 (1964) (Black, J., dissenting).

In *Halcyon*, since the stevedore, the party against which contribution was sought, could not under the Longshoreman's Act be liable to the injured plaintiff as a tortfeasor, it was not liable for contribution. However, given a case of common liability of the tortfeasors to the injured party, *Halcyon* is inapplicable. In the present case, Cooper, not being Session's employer and hence not shielded by the Act as to him, was potentially liable and vulnerable to suit no less than was the Vessel. Thus the considerations which prompted the Court's abstention in *Halcyon* from any attempt "to fashion new judicial rules" in light of the fact that "Congress has made fault unimportant in determining the employer's responsibility to his employee," 342 U.S. at 285, are not present in the case at bar and do not confound application of traditional rules of contribution.

B. Division of damages in admiralty after *Halcyon*.

The dicta of *Halcyon* has not stemmed the tide of judicial decisions expounding the historical right of contribution among joint tortfeasors in admiralty, nor has there been anything like general acceptance of the expanded reading of that case urged by Cooper. It is true that some lower courts subsequently construed the *Halcyon* dicta, in light of the result reached in that case, to mean that there is no contribution in maritime personal injury cases, or that contribution is restricted to "collision cases" exclusively. On the other hand, nearly all the commentators have strongly attacked this interpretation of the case, attributing it to superficial construction or to "analytical shortcomings" of the opinion itself. See: Staring, *Contribution and Division of Dam-*

ages in *Admiralty and Maritime Cases*, 45 Cal. L. Rev. 304 (1957); Allbritton, *Division of Damages in Admiralty—A Rising Tide of Confusion*, 2 Journal of Maritime Law and Commerce 323 (1971).

In post-*Halcyon* decisions, the lower courts have continued to apply a rule of contribution in various non-collision cases, including cargo damage cases, such as *Cain Bros. Inc. v. Wieman and Ward Co.*, 223 F.2d 256 (3rd Cir. 1955); *Coca Cola Co., Tenco Div. v. SS NORBOLT*, 333 F. Supp. 946 (S.D. N.Y. 1971); *American Independent Oil Co. v. MS ALKAID*, 289 F. Supp. 329 (S.D.N.Y. 1967); and *Cities Service Ref. Corp. v. National Bulk Carriers, Inc.*, 146 F. Supp. 418 (S.D. Tex. 1956); and in cases involving damage to a vessel (other than by collision) such as *Pennsylvania R.R. Co. v. The Beatrice*, 275 F.2d 209 (2d Cir. 1960) (damages divided among three negligent parties—shipowner, employer of pilot, and assisting tug—where barge sank while ship was being docked nearby); *W. E. Hedges Transp. Corp. v. United Fruit Co.*, 198 F.2d 806 (2d Cir. 1952) (damages divided equally between barge and ship where barge capsized when ballast sand was being transferred from ship to barge); *Southport Transit Co. v. Avondale Marine Ways, Inc.*, 234 F.2d 947 (5th Cir. 1956) (equal division of damages between tug owner and repair yard for fire damage to tug due to negligence of each occurring at different times); *Moran Towing Corp. v. M. S. Gammins Const. Co.*, 409 F.2d 917 (1st Cir. 1969) (equally divided damages where scows were injured through combination of negligent loading of stone by contractor and ordinary wear and tear of barges); *Dow Chemical Co. v. Tug Thomas Allen*, 349 F. Supp. 1354 (E.D. La. 1972) (damages equally divided between joint-

ly negligent tug owner and barge owner where tug towing barge grounded on pipeline with resulting explosion, property damage and personal injury); and *Bilkay Holding Corp. v. Consolidated Iron and Metals Co.*, 330 F. Supp. 1313 (S.D.N.Y. 1971) (damages to barge divided equally between towing company, for negligent towage, and charterer, for negligence in furnishing a foul berth, after deduction by one-third for barge owner's own contributing negligence).

In personal injury litigation, the right of contribution has been clearly recognized in such cases as *Horton & Horton, Inc. v. T/S J. E. DYER*, 428 F.2d 1131 (5th Cir. 1970), cert. denied 400 U.S. 993 (1971); *Watz v. Zapata Offshore Company*, 431 F.2d 100 (5th Cir. 1970); and *In Re Seaboard Shipping*, 449 F.2d 132 (2d Cir. 1971), cert. denied 406 U.S. 949 (1972), reh. den. 408 U.S. 932 (1972), all of which correctly construed *Halcyon* as posing no bar to contribution where there was no statutory immunity from tort liability of the party against whom contribution was sought.

Horton was a suit arising out of the death of a tug deckhand, who drowned while attempting to retrieve the tug's running lights and electric cord from a sinking barge which was in her tow. The tug owner, after effecting a settlement with the decedent's heirs, took an assignment of their rights against all other parties and sued the barge owner. The District Court found that the barge was unseaworthy and its owner negligent. It also found the tug owner negligent and that the deckhand's death was proximately caused by the mutual fault of both. The tug owner's damages were equally divided between it and the barge owner. On appeal, the barge owner argued that contribution was improper, relying upon *Halcyon*. How-

ever, the Court of Appeals concluded that the rule of *Halcyon* was properly confined to the facts there presented—where one wrongdoer was statutorily immune from tort liability. Since in the *Horton* case, the heirs of the deceased deckhand could have proceeded against either the tug owner or the barge owner, the Fifth Circuit held that *Halcyon* did not stand in the way of a division of damages between the two joint tortfeasors.

Watz involved an action by a shipyard worker who was injured while installing pipe in an exhaust system aboard a drydock barge. A hand hoist holding a heaving pipe failed, because a link of load chain gave way, and caused the pipe to roll onto his leg and foot. He sued the vessel owner, which impleaded the hoist manufacturer, which in turn impleaded the chain manufacturer. The vessel owner ultimately prevailed on the theory that the barge was withdrawn from navigation and hence owed no warranty of seaworthiness; but the District Court found both the hoist manufacturer and the chain manufacturer negligent in the manufacturing and placing in trade and commerce of a dangerous and defective product, and it divided the damages equally between them. Pointing out that the plaintiff could have sued both tortfeasors, the Court of Appeals held that "[w]ith *Hacyon* inapplicable * * * contribution is proper here." 431 F.2d at 120.

In Re Seaboard Shipping Corp. was a case in which two crew members of a barge were killed when lost from a barge under tow during a storm on Lake Michigan. The District Court found that the barge owner was negligent in knowingly permitting the barge to remain in an unseaworthy condition; and that the tug owner was likewise negligent in setting out with its tow after gale warnings

had been issued, without radio communication with the barge and lacking a properly calibrated barometer. The Second Circuit held that a right of contribution existed between the barge owner and tug owner, and expressly agreed with the Fifth Circuit's view, stated in *Horton and Watz*, that *Halcyon* is inapplicable in cases where the joint tortfeasor against whom contribution is sought is not immune from tort liability by statute. Further, the Second Circuit went on to point out that *Halcyon* did not mention this Court's prior decision in *White Oak Transp. Co. v. Boston, Cape Cod & New York Canal Co.*, 258 U.S. 341 (1922), approving a division of damages in a non-collision case arising from the loss of a vessel which sank in a canal due to the negligence of both the shipowner and the canal company. Observing that this non-collision case had never been overruled, the Second Circuit concluded that *White Oak* "controls here on the question of contribution and the extent of it." 449 F.2d at 139.

Each of the appellate court opinions in *Horton* and *In Re Seaboard Shipping* considered and rejected any interpretation of the dictum of *Halcyon* that would result in an across-the-board denial of contribution in all non-collision admiralty cases. This Court denied certiorari in both cases.

C. The *Atlantic* case.

Cooper seeks to compel a much broader construction of *Halcyon* through its heavy reliance upon a cryptic *per curiam* pronouncement by this Court in affirming the Second Circuit's decision in *Benazet v. Atlantic Coast Line R. Co.*, 442 F.2d 694 (2d Cir. 1971), *aff'd per curiam sub. nom., Atlantic Coast Line R. Co. v. Erie Lackawana*

R. Co., 406 U.S. 340 (1972). The *Atlantic* case arose out of a suit by a yard brakeman, employed by Erie, for injuries sustained by him while working on a box car owned by another railroad, Atlantic, while the box car was being transported on a carfloat barge owned by Erie. The accident was allegedly due to a defective footboard and handbrake of the box car, and the plaintiff sued Atlantic for its negligence in supplying the defective equipment. Atlantic sought contribution from Erie, the plaintiff's employer, on the ground that it was also actively negligent in causing the injury. Both the District Court and the Second Circuit denied Atlantic's claim on the ground that contribution under the facts of the case was precluded by *Halcyon*. This Court affirmed with a one-sentence comment that the third party complaint for contribution "in this noncollision admiralty case" was properly dismissed on the authority of *Halcyon*.

Cooper argues that this pronouncement is authority for extending the rule of *Halcyon* beyond the facts of that case to encompass the situation where the joint tortfeasor against whom contribution is sought does not enjoy statutory immunity from tort liability. Firstly, Cooper points to the Court's description of the *Atlantic* case as a "non-collision admiralty case" and contends that this "can only mean that for purposes of determining whether or not there is a right of contribution in admiralty, there are two kinds of cases: collision cases and non-collision cases." Secondly, Cooper asserts that *Atlantic* must be read as overruling the prior decisions of the lower courts because "the party against whom contribution was sought [in that case] was not statutorily immune from direct action by the plaintiff."

The first contention may be disposed of simply. It is not only an obvious nonsequitur but also, as has been demonstrated elsewhere herein, is refuted by the authorities in this country extending back ten decades. Furthermore, if importance is to be attached to the Court's choice of particular words, one might just as logically read the phrase "*this* non-collision admiralty case" with an emphasis that would indicate an intention to limit the holding to the facts of that specific case. (In fact, we think that this is the correct reading of *Atlantic* since, as will be shown, the case is factually indistinguishable from *Halcyon*.)

The second contention is likewise erroneous: there was no common tort liability of the two wrongdoers to the plaintiff in *Atlantic*. As the District Court pointed out in its opinion in that case, the limited liability provisions of the Longshoremen's Act were applicable to and shielded the plaintiff's employer from direct suit. 315 F. Supp. 357, 364, fn. 4 (S.D.N.Y. 1970). In *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334 (1952), this Court specifically held that a railroad brakeman who was injured while working on a freight car situated on a carfloat moored on navigable waters was subject exclusively to the Longshoreman's Act.

However, Cooper persists by arguing that the plaintiff in *Atlantic* could have sued his employer, Erie, for the unseaworthiness of its "vessel" (the carfloat) under the rule of *Reed v. The Yaka*, 373 U.S. 410 (1963), where this Court held that a longshoreman was not deprived by the Longshoreman's Act of his remedy based upon unseaworthiness of a vessel that happened to be owned by his employer. In this line of argument, Cooper is demon-

strably in error. In the first place, it is not at all clear that the plaintiff had any such remedy against his employer; and further, even if he did, the case would still not fall outside the *Halcyon* class of cases where there is no common liability of the joint wrongdoers as tortfeasors vis-a-vis the injured plaintiff.

Even if it be assumed *arguendo* that the *Atlantic* plaintiff could have sued his employer for the unseaworthiness of the carfloat, this Court's decision in *Reed* in no sense undermines the employer's statutory immunity from liability for its negligence, but rather turns upon the peculiar obligation of a shipowner to furnish a seaworthy vessel to those who do the work of seamen in her service. As the Court said in *Reed*, the shipowner-defendant in that case:

"* * * was not only an employer of longshoremen but was also a bareboat charterer and operator of a ship and, as such, was charged with the traditional, absolute, and nondelegable obligation of seaworthiness which it should not be permitted to avoid. * * *"
373 U.S. at 415.

Contrary to Cooper's suggestion that the two cases are irreconcilable, the holding in *Reed* resolved an issue which was not presented to or considered by the Court in *O'Rourke*, where it was held only that a maritime worker may not proceed against his employer on grounds of *negligence* in view of the prohibition of the Longshoremen's Act.

Liability for unseaworthiness is a species of liability without fault which derives from the employer's peculiar obligations as a shipowner. "It is peculiarly and exclusively the obligation of the owner * * *." *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85, 100 (1946). It does

not in any sense constitute a basis of common liability for concurrent fault with a third party. Since, as has been previously noted, contribution in admiralty arises directly from the tort rather than circuitously upon a theory of subrogation, *Erie R. Co. v. Erie & W. Transport Co.*, 204 U.S. 220, 226; *American Mut. Liability Ins. Co. v. Matthews*, 182 F.2d 322 (2d Cir. 1950), the vessel owner's potential liability—apart from any consideration of fault—on grounds of unseaworthiness does not afford a basis for the common liability for concurrent fault which is the *sine qua non* of contribution. Since under the Longshoreman's Act the employer-vessel owner cannot be a tortfeasor, he is not liable for contribution.¹

It is questionable in any event whether the *Atlantic* plaintiff did in fact have a cause of action against his employer on any theory or, at least (as the Court of Appeals noted in its opinion in the present case, 479 F.2d at 1042) the situation is simply unclear. As is evident from the opinions of the lower courts in the *Atlantic* case, the case was tried practically to conclusion without any recognition by the parties of the applicability of mari-

1. When an employer possesses statutorily limited liability to his employee, any adjustment of liabilities between the employer and a negligent third party must be a function of some relationship existing between them and cannot be derivative of the plaintiff's cause. Thus, in the familiar longshoreman-vessel owner-stevedore triangular litigation, where the shipowner is rendered vicariously liable by virtue of an unseaworthy condition created by the stevedore, the shipowner's remedy sounds in contract for breach by the stevedore of its implied warranty of workmanlike performance, as enunciated by *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). The District Court in *Atlantic Coast Line* appeared to recognize this. 315 F. Supp. 364, fn. 4. However, in a case such as the instant one, where either party was potentially liable to the plaintiff for negligence, a finding of concurrent negligence gives rise to a right of contribution grounded in their common liability to the plaintiff.

time principles. Many questions relevant to the rights and status of the parties were not raised or resolved by the trier of fact or the court. Was this plaintiff, a yard brakeman working on a rail boxcar, a "seaman" in the contemplation of *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), so as to be entitled to the warranty of seaworthiness in the first instance? As a related inquiry, was the carfloat a vessel in navigation? C.f., *West v. United States*, 368 U.S. 118 (1959). This Court has held that a shore-based worker cannot recover for injuries caused by unseaworthiness if his employment is not of a type traditionally done by seaman or was not so engaged aboard a vessel in navigation. *United Pilots Assn. v. Halecki*, 358 U.S. 613 (1959); *Roper v. United States*, 368 U.S. 20 (1960). See also: *McQuaid v. United States*, 337 F.2d 483 (3d Cir. 1964); *McCowan v. Humble Oil & Refining Company*, 405 F.2d 596 (4th Cir. 1969), cert. denied 395 U.S. 934 (1969); *Delome v. Union Barge Line Co., et al*, 444 F.2d 225 (5th Cir. 1971), cert. denied, 404 U.S. 995 (1971). Further, no consideration was apparently given to the question of implicit warranties or contractual relations between the railroads, c.f., *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), which might entitle Erie to indemnity should it be held liable by reason of an unseaworthy condition created by the negligence of Atlantic.

In urging this Court's cryptic pronouncement in *Atlantic* as compelling an extension of the *Halcyon* holding far beyond the facts of that case to establish a rule that no right of contribution obtains in any "non-collision" admiralty case, despite all historical precedents to the contrary, Cooper clearly seeks to impart a very profound im-

pact on admiralty jurisprudence to a very few words. The policy arguments with which this position is bolstered are addressed elsewhere within this brief. It is worth noting, however, as has been observed in another context, that one significant consideration is "the unlikelihood of the Supreme Court undertaking to make such a sweeping choice in the heavy seas of conflict by such an unilluminating pronouncement." *Grigsby v. Coastal Marine Service*, 412 F.2d 100; (5th Cir. 1969) (per Brown, Chief Judge) cert. dism'd 396 U.S. 1033 (1970). Such a summary disposition of *Atlantic* was certainly not surprising in view of the peculiar fact situation of that case, which might initially have appeared to present a suitable vehicle for the Court's examination of the issue of contribution outside the *Halcyon* fact situation, but on closer examination turns out to be a case indistinguishable from *Halcyon*.

It seems quite significant to note here that only one week after this Court delivered its per curiam opinion in *Atlantic*, it denied certiorari in *In Re Seaboard Shipping Corp.*, *supra*, (sub. nom. *Seaboard Shipping Corp. v. Moran Inland Waterways Corp.*, 406 U.S. 949), wherein the Second Circuit allowed contribution in a non-collision context, expressly distinguishing *Halcyon* as limited to cases where the party from which contribution is sought is statutorily immune from tort liability. Even later, the Court denied a rehearing in the case. 408 U.S. 932. It is worthy of note that the Court did not choose, as it did in *Atlantic*, to dispose of the case summarily by reversing it "on the basis of *Halcyon* * * *."

As has been demonstrated, nothing in this Court's prior decisions forecloses it now to fashion rules respecting division of damages in admiralty which will "best

serve the ends of justice," as the Court defined its power so to do in *Halcyon*, *supra*, 342 U.S. at 285. For that purpose, it is respectfully submitted that this case, unlike *Atlantic*, affords a suitable vehicle.

III.

THERE IS NO COMPELLING REASON IN POLICY OR PRECEDENT FOR THIS COURT TO ABSTAIN FROM FASHIONING RULES CONCERNING DIVISION OF DAMAGES AMONG JOINT TORTFEASORS IN ADMIRALTY.

Cooper urges this Court to follow its course in *Halcyon* and abstain once again from enunciating any rule of contribution in the present case, leaving these parties without remedy and relegating to Congress the problem of working out any "compromise between competing economic forces" in the field of maritime commerce. (Brief for Petitioner, pp. 13.) It hardly seems appropriate, however, that this Court should choose now to decline to fashion appropriate rules of contribution among joint maritime tortfeasors, in view of the pervasiveness of the divided damages doctrine in admiralty jurisprudence, as well as the undeniable fact that the adjustment of rights *inter se* among such parties has been one primarily of judicial, not legislative concern.

A. *Ryan* and its progeny.

In retrospect over the last two decades, it seems singularly inappropriate to suggest that this Court now leave the development of the law governing the relationship between vessel owner and stevedoring contractor, and other analogous maritime relationships, to legislative adjustment. While the *Halcyon* opinion contains some language con-

cerning the desirability of leaving to Congress the task of "bring[ing] about a fair accommodation of the diverse but related interests of these groups," *Halcyon*, supra at 15, yet it is hardly possible to demonstrate that this view has prevailed as the attitude of the Court. On the contrary, it is undeniable that this "area of the law" has been one primarily of judicial concern and one in which this Court has long assumed the role of chief policy maker.

As is well known, *Halcyon* was not this Court's retiring word in the adjustment of liabilities between shipowner and stevedore. Four years later, *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co.*, 350 U.S. 124 (1956), found in the contractual relationship between ship and stevedore an "implied warranty of workmanlike service," the breach of which by the stevedore rendered it liable to indemnify the shipowner for any resulting liability which the latter incurred, including for the personal injuries of a longshoreman employed by the stevedore. This liability of the stevedore inhered in his express or implied contract with the shipowner, and the stevedore could no longer hide behind the tort immunity afforded him by the Longshoreman's Act. Later, in *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1957), the Court taught that the shipowner could in some instances be precluded by his conduct or the condition of his vessel from the recovery of indemnity, notwithstanding the stevedore's breach of warranty. In *Italia Societa Per Azioni v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964), the Court articulated the underlying rationale of *Ryan-Weyerhaeuser*, that "liability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury." 376 U.S. at 754.

As recently as 1969, this Court announced yet a new cause of action, holding in *Federal Marine Terminals v. Burnside Shipping Co., Ltd.*, 394 U.S. 488 (1969), that a stevedore could maintain a direct action in tort against the shipowner for compensation payments incurred by reason of the shipowner's negligence. In several provocative paragraphs of dicta, the Court indicated that its prior decisions would not foreclose the possibility of recovery upon other tort or contract theories, and that it was deciding nothing with respect to the interaction between the shipowner's breach of warranty claim and the stevedoring contractor's tort claim against the shipowner.

Meanwhile, the lower federal courts have extended the *Ryan* principles beyond the shipowner-stevedore context to many other relationships, C.f., *Dunbar v. Henry DuBois' Sons Co.*, 275 F.2d 304 (2d Cir. 1960, cert. denied 364 U.S. 815 (1960)); *Whisenant v. Brewster-Bartle Offshore Company*, 446 F.2d 394 (5th Cir. 1971); and have acted upon this Court's invitation in *Burnside* to entertain new theories of indemnity between shipowner and stevedore, *Quadrino v. SS THERON*, 323 F. Supp. 1037 (S.D.N.Y. 1970), aff'd 463 F.2d 959 (2d Cir. 1971); *Atlantic & Gulf Stevedores v. Skibs A/S Danmotor*, 342 F. Supp. 837 (S.D. Tex. 1971).

It is unnecessary to lengthen this discussion with further exposition of the growth of *Ryan* and its progeny in order to demonstrate that this Court's many post-*Halcyon* decisions, and the numerous interpretations of them by the lower courts, have made the "accommodation of the diverse but related interests" (*Halcyon, supra*, 342 U.S. at 286) in the area of maritime commerce a subject of massive judicial involvement, notwithstanding any language in *Halcyon* evidencing timidity concerning the pros-

pect. The intensive judicial activity of two decades refutes any suggestion that the defining of rights *inter se* among these groups is primarily a legislative concern. Now to refer these parties and their controversy to Congress would be anomalous and inappropriate.

B. Recent amendments to the Longshoremen's Act.

Cooper suggests that Congress' enactment of the 1972 amendments to Sec. 5 of the Longshoreman's Act, 33 U.S.C. §905, gives this Court reason to hark back to *Halcyon's* abstention approach and retreat from the area in view of the recent legislative initiative. But, as is apparent from the legislative history, Congress' purpose in enacting the 1972 amendments was not to accept *Halcyon's* twenty-year-old invitation to preempt the field of risk distribution in the maritime industry, but rather to satisfy a felt need for a substantial increase in the rate of compensation benefits payable under the Act. The concurrent amendment of Sec. 5 to eliminate the longshoreman's unseaworthiness remedy and the vessel's derivative indemnity action against the stevedore-employer (33 U.S.C. §905(a)) was included as an offset to the employer's greatly expanded compensation exposure, by removing his circuitous *Sieracki-Ryan* liability for general damages for his employees' injuries.²

2. The Report of the House Education and Labor Committee (No. 92-1441), is excerpted below:

"Purpose and Background of Legislation"

"Amendments to the Longshoremen's and Harbor Workers' Compensation Act are long overdue. This Act has not been amended since 1961. In that year, the maximum benefit under the Act was set at \$70 a week. Today, the average longshoreman's or ship repairman's

While this legislation obviously affects the rights *inter se* of vessel owners and stevedores in some circumstances, it certainly is not addressed to the overall problem of allocation of damages in the field of maritime commerce and hardly affords any reason for complete abolition of the judicial rule of contribution in all non-collision admiralty

wage is over \$200 a week in some ports. In order to provide adequate income replacement for disabled workers covered under this law a substantial increase in benefits is needed. Although employer groups indicated their willingness to increase worker benefits, they sought a modification of a long line of Supreme Court rulings. These decisions ruled that a shipowner was liable under the doctrine of seaworthiness, for damages caused by any injury regardless of fault. In addition, shipping companies generally have succeeded in recovering the damages for which they are held liable to injured longshoremen from the stevedore's employer on theories of expressed or implied warranty, thereby transferring their liability to the actual employer of the longshoremen. * * *

"The Committee believes that especially with the vast improvement in compensation benefits which the bill would provide, there is no compelling reason to continue to require vessels to assume what amounts to absolute liability for injuries which occur to longshoremen or other workers covered under the Act who are injured while working on those vessels. * * *

"The Committee also believes that the doctrine of the *Ryan* case, which permits the vessel to recover the damages for which it is liable to an injured worker where it can show that the stevedore breaches an express or implied warranty of workmanlike performance is no longer appropriate if the vessel's liability is no longer to be absolute, as it essentially is under the seaworthiness doctrine. Since the vessel's liability is to be based on its own negligence, and the vessel will no longer be liable under the seaworthiness doctrine for injuries which are really the fault of the stevedore, there is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore or other employer of the worker. * * *

1972 U.S. Code Cong. & Adm. News 4698-4699, 4703, 4704.

The Senate Labor and Public Welfare Committee Report (No. 92-1125) is in all substantial respects identical.

cases. For all practical purposes, it is simply irrelevant to the Court's consideration of the present case.³

C. Uniformity in the law of admiralty.

As Cooper has correctly pointed out, "[a]n underlying theme of admiralty, and one of the reasons for the existence of a separate body of admiralty law is the desire for uniform principles to govern maritime activities throughout the United States." (Brief for Petitioner, p. 15) This Court has recently cited the desirability of assuring "uniform vindication of federal policies" as a ground for overruling an 84-year-old precedent that anomously declined to recognize a right of recovery for wrongful death under the general maritime law. *Moragne v. States Marine Line, Inc., et al*, 398 U.S. 375 (1970), overruling *The Harrisburg*, 119 U.S. 199 (1886). By the same token, it is difficult to imagine a rule which is more pervasive in admiralty jurisprudence than the doctrine of divided damages, and clearly its abolition outside the narrow context of ship collision cases would work a substantial disruption in the uniform application of maritime principles.

In the first place, such a dichotomy in application of contribution principles, which would require their strict application in one class of cases and their absolute prohibition in another, would simply establish an illogical inconsistency in the law, and one for which there is no rational justification. In fact, it would turn admiralty's face against a principle so rooted in historical concepts

3. As Cooper correctly points out, the 1972 amendments to the Longshoremen's Act would apparently have no effect upon a case arising on facts similar to the present one, since Cooper was not Sessions' employer and would not be entitled to the exclusive liability benefits of §5(a).

of equity and which this Court has long ago described as "manifestly just and proper." *The Max Morris*, 137 U.S. 1, 14 (1890).

Furthermore, a rule prohibiting contribution in a maritime tort case of joint wrongdoers would produce an inconsistent result in a specific case, where there is permitted comparison of the negligence between the injured tort victim and the tortfeasor against whom he recovers. Under such a rule, the liable tortfeasor would be entitled to the benefit of credit for that portion of the damages attributed to the victim's own negligence, but would be denied a like credit for that portion of the same damages caused or contributed to by another wrongdoer. The injustice of that situation is manifest in a case, such as the present one, where the tort victim chooses to sue only one of the joint wrongdoers, who then must fully satisfy the loss without recourse (absent a right of contribution) for that portion of the damages which are not of his own doing.

Cooper contends that "the rule denying contribution does provide a clear guide for the planning of activities in the maritime sphere." (Brief for Petitioner, p. 18.) This, of course would be true if the rule were in fact uniformly applied. But the rule contended for by Cooper would divide admiralty jurisprudence into arbitrary classes of cases for determining the availability of contribution, and would bring about the illogical and inconsistent result of permitting division of damages between a tortfeasor and his victim when there is negligence in the party suing, but forbidding an equitable apportionment of the loss which is caused by the concurring wrongs of multiple parties. Moreover, as this Court has recognized, it does not serve the law's purpose to "furnish a clear guide

for the conduct of individuals", *Moragne v. States Marine Line*, 398 U.S. 375, 403 (1970), for this Court to reverse a long-established judicial principle rooted in ten decades of prior decisions. For the adoption of such a rule prohibiting any right of contribution outside the context of collision cases would necessarily require overruling a long line of this Court's prior decisions, discussed in Part I of this brief, beginning with *The Alabama and the Gamecock*, 92 U.S. 695 (1875), and certainly including *Atlee v. Packet Co.*, 88 U.S. (21 Wall) 389 (1874), and *White Oak Transp. Co. v. Boston, Cape Cod & N.Y. Canal Co.*, 258 U.S. 341 (1922). It would require disapproval of a multitude of lower court decisions many of which this Court has previously declined to review and a number of which it has specifically approved, c.f., *The Max Morris*, 137 U.S. 1 (1890); *The Nidarholm*, 34 F.2d 442 (1st Cir. 1929), *aff'd* 282 U.S. 681 (1931).⁴

4. Cooper raises the curious point that its incurrence of liability for *contribution* in this case did not fall within the potential liabilities which it contemplated in "planning its activities," including its contractual dealings with the Vessel. This is strange, in the first instance, because Cooper acknowledges awareness of "existing rules which, under some circumstances, might impose liability upon Cooper to indemnify the vessel with respect to accidents occurring in subsequent ports." (Brief of Petitioner, p. 20.) In other words, Cooper would not have been surprised to incur liability for full *indemnity* to the Vessel in this case, but complains that it unexpectedly was held only for contribution. In any event, the contention that "[t]he reasonable expectation of all of the experienced maritime lawyers involved in this litigation was that there was no such right of contribution" is obviously not well-taken, in view of the explicit holdings to the contrary by the Court of Appeals for the Fifth Circuit in *Horton and Watz*.

In this connection, Cooper suggests that its lack of foresight as to the outcome of this case left it exposed on an uninsured risk. Of course, even if such a consideration would be deemed relevant to a resolution of the present issue, there is absolutely no evidence in the

Quite contrary to Cooper's assertion, the principle of uniformity in the law, and its purpose to furnish a clear guide for the conduct of individuals, is clearly best served by a recognition of the universal application of the historic principle of contribution in all cases of maritime tort founded upon negligence, save only in that narrow class of cases where one concurrent wrongdoer is statutorily shielded from tort liability.

IV.

CONTRIBUTION IS PROPER IN THE PRESENT CASE.

In the case at bar, the District Court found that the injuries and damages sustained by the plaintiff, Sessions, were caused by the concurring negligence of the Vessel and of Cooper. Since each tortfeasor was potentially liable to the plaintiff for its negligence, a finding of concurrent negligence gives rise to a right of contribution grounded in their common liability to the plaintiff. However, Cooper raises certain additional objections to the propriety of the award of contribution in the present case, which will be dealt with in this section of the brief.

record as to what, if any, liability or indemnity insuring agreements Cooper may have had. However, it is obviously unlikely that any comprehensive general liability coverage would be so narrowly and peculiarly drawn as to insure the risk of indemnity but exclude coverage for contribution. If Cooper is in fact uninsured on its liability in this case, such is more probably due to a lack of foresight in other particulars, such as failure to obtain (at increased premiums, no doubt) a "completed operations" endorsement which would expand coverage to liability incurred by reason of its breach of warranty and arising after the vessel had sailed from the loading port.

A. The Vessel did not extinguish its cause of action against Cooper by settling its separate and distinct cause against Mid-Gulf.

Cooper argues that the Vessel cannot recover contribution against Cooper because of a prior settlement of its indemnity claim against Mid-Gulf, the plaintiff's employer. The argument is that the Vessel "has already been fully indemnified" and has not suffered any damages for which it is entitled to contribution. (Brief for Petitioner, p. 23.)

Even assuming that there is any merit to this argument theoretically, it is unsupported by evidence. The terms of the settlement between the Vessel and Mid-Gulf were never spread upon the record, and there is most certainly no evidence that "Mid-Gulf made an agreement with the vessel agreeing to indemnify it against any recovery which might be made by the plaintiff." (Brief for Petitioner, p. 23.)⁵

Cooper's basic reasoning, however, is fallacious. The Vessel's respective claims against Mid-Gulf and Cooper were neither joint nor interdependent. Each claim was grounded upon a breach of a separate contractual obligation—the stevedore's implied warranty of workmanlike service. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co.*, 350 U.S. 124 (1956). Under the rule of *Ryan*, "* * * every stevedoring contract contains an implied warranty

5. Trial counsel for the Vessel, Mr. Dixie Smith, was called as a witness by Cooper at the trial, apparently in an attempt to prove up the terms of the settlement between the Vessel and Mid-Gulf. However, Mr. Smith testified that the settlement negotiations in question were consummated without his knowledge and that he was not in fact aware of the exact terms of the settlement. (A. 119) No other evidence on this matter was offered.

running from the stevedore-employer to the shipowner that the stevedoring operations will be performed in a safe and workmanlike manner." *American Export Isbrandt-sen Lines, Inc. v. City of Milwaukee*, 440 F.2d 502, 504-505 (7th Cir. 1971).

The claim against Mid-Gulf was based upon incidents occurring while employees of that contractor were working aboard the KARINA at Houston on July 2, 1969; the claim against Cooper was grounded upon events occurring on June 28, 1969, at Mobile, and arising out of work then being done aboard the same ship by employees of Cooper. Because these liabilities were several and not joint, the Vessel had the right to proceed against either or both, to settle one and prosecute suit on the other, or to abandon one while preserving its rights against the other. The Vessel has never evidenced any intention of abandoning its claim against Cooper.

As against Mid-Gulf, the Vessel was entitled to recover such damages as could be shown to have been occasioned by reason of that stevedore's breach of warranty. Such damage is unrelated to that occasioned by reason of Cooper's negligence. Cooper is not entitled to credit against the damages attributable to its own negligence for any amount recovered by the Vessel under its separate contractual arrangements with another party.

B. The pleadings adequately apprised Cooper of the facts in issue and that the Vessel was seeking recovery over in respect of Session's damages.

Cooper's contention that contribution should be denied because the Vessel sought only full indemnity in its plead-

ings is frivolous. Cooper was clearly apprised that the Vessel was seeking recovery over in respect of the liability asserted against it by Sessions, and it is absurd to suggest that the ultimate allowance against it of a lesser recovery constituted surprise to Cooper. It is hornbook law that pleadings are to be liberally construed. *United Mine Workers of America v. Electro Chemical Engraving Co.*, 175 F. Supp. 54 (S.D. N.Y. 1939). It is sufficient that pleadings inform the parties and the Court of facts in issue so that the court may declare the law and the parties may know what to meet by their proof. *Mitchell v. Wright*, 154 F.2d 924 (5th Cir. 1946), cert. denied 329 U.S. 733 (1946).

C. Contribution was properly allowed because Cooper was found to be jointly negligent with the Vessel in causing Sessions' damages.

Cooper curiously asserts that it was "not found to be a tortfeasor vis-a-vis the plaintiff, and there is no finding that Cooper breached any duty to the plaintiff." (Brief for Petitioner, p. 25.) That contention is simply in error. The District Court plainly stated in its oral findings the following:

"That Cooper Stevedoring Company was responsible for the stowage and that they were negligent in not stowing the cargo in a manner and method in which people could safely walk on top of them, because it was obvious that other longshoremen in other ports would have to work on top of them.
* * *" (A. 164)

There can be no question that the trial court concluded that Cooper and the Vessel were joint tortfeasors

vis-a-vis Sessions. Elsewhere, the Court summarized his liability findings as follows:

"And that is what I find, that they [Cooper and the Vessel] are each fifty percent responsible for the injury to Mr. Sessions." (A. 165)

Cooper also argues that it breached no duty it owed the Vessel, a contention which confuses the indemnity and contribution issues, since the right of contribution is "a consequence of the joint tort and attached to the joint liability," 2 Benedict, *Admiralty* 552 (6th ed. 1940), while the right of indemnity arises out of a separate relationship between indemnitor and indemnitee. (Cooper's contentions concerning the duties owing between ship-owner and stevedore will be dealt with elsewhere.) Cooper's liability for contribution is founded upon concurrent negligence in causing the plaintiff's injuries and damages, as indisputably found by the trier of fact.

D. The cause should not be remanded.

Cooper suggests that if contribution is to be awarded in the present case, then the case should be remanded to the trial court "to consider afresh the case as a contribution case, giving the parties the right to develop both the facts and the law further." (Brief for Petitioner, p. 22.) Cooper does not suggest what "facts" could be developed which were not adduced at trial. Certainly the parties have had ample opportunity to develop all facts relevant to the incident made the basis of this suit, and the issues before this Court are purely issues of law which have now been fully developed through two appeals. No apparent purpose would be served by a remand. The case is properly one for decision by this Court.

V.

WHERE JOINT TORTFEASORS STAND IN A CONTRACTUAL RELATIONSHIP, DAMAGES SHOULD BE APPORTIONED AMONG THEM ON A COMPARATIVE FAULT BASIS, UNLESS THEIR RIGHTS ARE TO BE DETERMINED STRICTLY ON THE BASIS OF IMPLIED WARRANTY AND INDEMNITY.

The rights and obligations *inter se* of shipowners and stevedores have been ordinarily determined according to their contractual relationships and the implicit nature thereof as defined by *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). In *Ryan*, this Court held that where a shipowner and stevedoring company enter into a service agreement, the former is entitled to indemnification for any damages it sustains (including attorney's fees and expenses incurred in resisting a claim against it) as a result of the stevedoring company's breach of its implied warranty of workmanlike service. "This undertaking . . . is comparable to a manufacturer's warranty of the soundness of its manufactured product." 350 U.S. at 133-134. This Court has distinguished recovery of indemnity for breach of warranty from a right of contribution between joint tortfeasors, pointing out that each "proceed on two wholly distinct theories and produce disparate results." *Italia Societa v. Oregon Stevedoring Company*, 376 U.S. 315, 321 (1964).

Cooper urges that rules of divided damages be excluded from application between parties who stand in a contractual relationship and that risks of loss between them should be allocated in accordance with the law of con-

tractual indemnity under *Ryan*. It is true that *Ryan* is clearly applicable on its face to the present case, and the right of contribution among joint tortfeasors who stand in a contractual relationship must therefore be reconciled with existing doctrines of indemnity.

A. On the basis of a strict *Ryan* analysis, the Vessel is entitled to recover full indemnity from Cooper.

A strict application of *Ryan* to the exclusion of any rule dividing damages in the present case would not, as Cooper suggests, result in exoneration from liability for Cooper, but rather would require that the Vessel recover full indemnity. This result follows from the District Court's finding of a negligent breach by Cooper of its warranty of workmanlike service owing to the Vessel. (A. 164, 168)

Cooper's contention that indemnity should be denied on a strict *Ryan* analysis is based upon its incorrect assertion that the Vessel "was guilty of conduct sufficient to preclude indemnity." (Brief for Petitioner, p. 30) The District Court made no such finding. Rather, the trial court simply stated his feeling that "the ship itself has a responsibility" relative to the stowage of cargo, and that "the only thing to do is to divide the liability in this case equally" between the Vessel and Cooper. (A. 165) However, under *Ryan*, it would be improper to compare the fault of the Vessel and Cooper for purposes of adjusting the liabilities between them. The comparative fault of ship-owner and stevedore measured in terms of negligence is irrelevant. If the stevedore renders a substandard performance leading to foreseeable liability on the part of the

shipowner, then the latter is entitled to indemnity "absent conduct on its part sufficient to preclude recovery." *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1958). The shipowner's conduct in this connection is likewise measured by the law of contract; and such conduct, to preclude indemnity, must be sufficient to prevent the workmanlike performance of the stevedore's contractual obligations. *Waterman S.S. Co. v. David*, 353 F.2d 660 (5th Cir. 1965), cert. denied 384 U.S. 1008; *Southern Stevedoring & Contract Co. v. Hellenic Lines, Ltd.*, 388 F.2d 267 (5th Cir. 1968).

Cooper seeks to compel a finding of "preclusion" on the theory that, notwithstanding its negligent stowage of the cargo in such a manner as to cause Sessions' injuries, still it was the Vessel's responsibility to inspect the stowage and insist that Cooper correct its improper condition. (Brief for Petitioner, pp. 26-28.) This argument simply flies in the face of *Ryan*, which explicitly rejected the stevedore's argument that a shipowner's right to indemnity could be defeated by the shipowner's failure to supervise the stowage and reject unsafe stowage by the stevedore:

"* * * [T]he contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense." 350 U.S. at 135.

The District Court was quite correct, of course, in postulating that both the Vessel and Cooper had a "responsibility" with respect to the condition of the cargo. The Vessel owed a nondelegable duty to furnish all workmen who labor in its service, including a longshoreman such as Sessions, a seaworthy vessel. *Seas Shipping Co., Inc. v.*

Sieracki, 328 U.S. 85 (1946). However, the duties owing from the Vessel to Sessions were not identical with those owing by Cooper to the Vessel; for the warranty which Cooper owed when its employees boarded the *KARINA* was plainly for the benefit of the Vessel. *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423 at 429 (1959). Even though the District Court could find that, measured by tort standards, the Vessel was negligent in failing to inspect, discover or correct Cooper's improper loading methods and/or the resulting unsafe condition, while this would be relevant to provide Sessions a basis of recovery against the Vessel, it would have no bearing upon the Vessel's right of recovery against Cooper for its breach of warranty in failing properly to stow the cargo.

Here, the substandard conduct of the stevedore, Cooper (as measured by its warranty) was a proximate cause of the Vessel's damages, and there is no finding of conduct on the part of the Vessel sufficient to preclude indemnity. Therefore, if the present case is to be resolved upon a strict *Ryan* indemnity analysis, to the exclusion of contribution principles, the inexorable result is that the Vessel recover its full indemnity from Cooper.

B. Damages may be equitably apportioned between parties in a contractual relationship by precluding recovery of indemnity to the extent that the loss is caused by the negligence of the indemnitee.

Many authorities believe that the *Ryan* theory of indemnity was originally formulated by this Court in an effort to ameliorate the harsh results of *Halcyon*. E.g., Baer, *Admiralty Law of the Supreme Court*, p. 195 (2d ed. 1969); Gilmore & Black, *The Law of Admiralty*, p. 367

(1957); Bue, *Admiralty Law in the Fifth Circuit—A Compendium for Practitioners: I*, 4 Houston L. Rev. 347, 410 (1966). However, the "sudden death playoff" nature of the *Ryan* approach may just as frequently result in transferring the inequity by saddling the indemnitor with full liability in a multiple fault situation, even though his fault is comparatively less than that of his indemnitee. C.f., *McLaughlin v. Trelleborgs Angfartygs A/B*, 408 F.2d 1334, 1338 (2d Cir. 1969), cert. denied 395 U.S. 946 (1969). Therefore, it hardly seems imperative that *Ryan* be read as preempting any theory of division of damages outside the *Halcyon* situation, i.e., where the statutory tort immunity of one wrongdoer precludes a comparative negligence approach.

This Court has previously recognized the principle that damages may be apportioned between parties in a contractual relationship where the fault of both has contributed to cause the loss. *United States v. Seckinger*, 397 U.S. 203 (1970), was a case in which the United States had satisfied a tort judgment against it obtained by an employee of one of its contractors for personal injuries sustained while working on a Government project. It then brought suit against the contractor seeking indemnity under a clause of the construction contract providing that the contractor would be responsible for damages occurring as a result of the contractor's fault or negligence. The Court of Appeals had held that the Government's recovery on the contract was foreclosed since its negligence had contributed substantially to the employee's injury and since the contract did not specifically provide for indemnity against the Government's own negligence. 408 F.2d 146. On certiorari, however, this Court reversed, and held that liability should be premised on the basis of comparative negligence, the contractor being

required to indemnify the Government to the extent of the contractor's negligence contributing to the employee's injuries, but not insofar as the injuries were caused by the Government's negligence. The cause was remanded to the District Court for specific findings as to the relative fault of each.

This approach is sound authority for dividing damages on a comparative fault basis among parties in a contractual relationship rather than resorting to an "all or nothing" approach on the basis of a simple breach of warranty analysis. On this basis a shipowner would be precluded from recovering its damages occasioned by reason of substandard performance by a stevedore of its contractual obligations to the extent that the loss was actually contributed to by the shipowner's own fault. Thus, in the present case, the Court of Appeals concluded that the Vessel's own fault, which the District Court found to have contributed equally with Cooper's negligence to cause Sessions' damages, precluded its full recovery of indemnity from Cooper. The parties were therefore each required to bear that portion of the damages which could be ascribed to their own negligence.

Thus the result reached in the present case is an equitable one which comports with admiralty's traditional concept of division of damages in cases of mutual fault. It could obtain in all cases in which the rights and obligations of the parties are defined by contractual arrangement.

CONCLUSION

This Court should affirm the judgment of the United States Court of Appeals for the Fifth Circuit, decreeing

that Respondents recover contribution from Petitioner in respect of the damages adjudged in favor of Troy Sessions by the District Court. Alternatively, if contribution is disallowed in the present case, then this Court should reverse the judgments below and render judgment that Respondents recover full indemnity in respect of all damages payable to Sessions, together with Respondents' reasonable attorneys' fees and expenses incurred in the defense of Sessions' claim against them.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this _____ day of March, 1974, a true and correct copy of the foregoing Brief for Respondents was personally delivered to counsel for Respondents, Joseph D. Cheavens, of Baker & Botts, 3000 One Shell Plaza, Houston, Texas 77002.

Bruce Dixie Smith

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MICHAEL RODAK, JR.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1973

NO. 73-726

COOPER STEVEDORING COMPANY, *Petitioners*

v.

FRITZ KOPKE, ET AL, *Respondents*

**SUPPLEMENTAL BRIEF FOR
RESPONDENTS**

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**SUPPLEMENTAL BRIEF FOR
RESPONDENTS**

*To The Honorable The Chief Justice and the Associate
Justices Of The Supreme Court Of The United States:*

This Supplemental Brief is restricted to presentation of a late authority not available in time for inclusion in Respondents' brief in chief nor before this case was called for hearing on April 15, 1974.

ARGUMENT

The Courts of Appeals of three circuits have now concurred in holding that contribution is proper among joint tortfeasors in admiralty who share a common liability for the tortious act.

At the time this cause was called for hearing by the Court, the two Courts of Appeals which had considered

the question had rejected Petitioners' argument that this Court's decision in *Halcyon Lines v. Haenn Ship Ceiling Corp.*, 342 U.S. 282 (1952), prohibited any right of contribution among joint tortfeasors in admiralty outside the strict context of a case involving collision between two vessels. Both the Fifth Circuit, in *Watz v. Zapata Off-Shore Company*, 431 F.2d 100 (5th Cir. 1970), and *Horton & Horton, Inc. v. T/S J. E. Dyer*, 428 F.2d 1131 (5th Cir. 1970), cert. denied 400 U.S. 993 (1971), and the Second Circuit, *In Re Seaboard Shipping Corp. and Moran Inland Waterways Corp.*, 449 F.2d 132 (2d Cir. 1971), cert. denied 406 U.S. 949 (1972), had held that the "prohibition" of *Halcyon* does not apply to a situation where none of the tortfeasors possesses a statutory immunity from tort liability and the injured party could have proceeded against any of the tortfeasors and could have recovered damages from each. In its Petition for Writ of Certiorari in this case, Petitioner cited as contrary authority the holdings of three district court cases from the Ninth Circuit. (Petition, p. 9.) On April 18, 1974, two days after the oral argument of this case, the Court of Appeals for the Ninth Circuit reversed one of those cases relied upon by Petitioner and aligned the law of that Circuit with the views of the Second and Fifth. The Ninth Circuit's opinion of that date in *United States of America v. Standard Oil Company of Calif.*, ___ F.2d ___ (Nos. 72-1040, 72-1120, 72-1121), reversed the district court judgment in *In Re Standard Oil Company of Calif.*, 325 F.Supp. 388 (N.D. Calif. 1971).

In that case, an oil company, Standard, sought contribution from the United States for damages paid in connection with claims resulting from a disastrous gasoline fire in San Francisco Bay. A tug owned by Standard

had grounded one of the company's barges on an abandoned launching ramp in the Bay's Central Basin Area, and one of the barge's tanks had ruptured permitting a large quantity of gasoline to leak onto the waters. Thereafter, a Coast Guard patrol boat, attempting to inspect the situation, in some manner ignited the gasoline vapors. In the resulting conflagration, three members of the crew of the Standard tug and barge were killed, as were two Coast Guard sailors, and a third Coast Guard sailor was injured. There was extensive fire damage to the Standard barge and tug and to the Coast Guard patrol boat and assorted property damage to docks, rafts, floats, piers and other shore property.

Claims were filed against both Standard and the United States in their respective limitation proceedings by the estates of the deceased Standard employees. However, claim in behalf of the various property damage claimants were filed only against Standard. Standard and the United States filed claims against each other, and Standard also sought contribution or indemnity from the United States for the property damage claims which had been filed only against Standard.

Following a trial on the Government's petition, the district court, sitting in admiralty, found both parties to be equally and mutually at fault in causing the fire and the resulting damages. However, the trial court denied Standard any right of contribution for any amounts paid or to be paid to the various property damage claimants. That court relied upon *Halcyon* for the proposition that the maritime rule, like the common law, barred contribution among tortfeasors. It expressed disagreement with the reasoning of the Fifth Circuit in *Horton and Watz*.

The Court of Appeals agreed with the district court's determination of mutual liability but reversed its decision denying Standard contribution. The Ninth Circuit specifically disapproved the lower court's reading of *Halcyon*, pointing out that the holding of that case was compelled by the peculiar facts there presented, and characterizing the result as "an exception to the established admiralty doctrine of apportioning damages equally among mutual wrongdoers." It distinguished the *Halcyon* dicta as follows:

"* * * Although the exception is stated broadly to include all noncollision maritime cases, the Court's reasons for denying contribution in that case were narrow. That is, where Congress had expressly immunized Haenn, as an employer of harbor workers, from suits by its employees for tort liability, the Court found it inappropriate, in effect, to evade this congressional policy by permitting a right of contribution against Haenn. Since no prior Supreme Court decision required that contribution be granted in noncollision cases, the Court refused to grant such relief in that case. *Halcyon*, *supra* at 285-87. But see *White Oak Transportation Co. v. Boston, Cape Cod & New York Canal Co.*, 258 U.S. 341 (1922).

We agree with the Fifth Circuit Court of Appeals that regardless of whether *Halcyon* is strictly limited to its facts denying contribution from a joint tortfeasor who is statutorily immune from suit, or whether its broad language concerning all non-collision maritime actions is considered dictum, the *Halcyon* doctrine is inapplicable here. *Horton & Horton, Inc. v. T/S. J. E. Dyer*, 428 F.2d 1131, 1134 (5th Cir. 1970), cert. denied, 400 U.S. 933 (1971). In this case, those individuals who suffered property damage filed claims first only against Standard, probably because of the great likelihood that it would be held responsible for such losses. But,

had any of these claimants foreseen that the United States similarly would be held liable, undoubtedly they would have made these claims against the Government, just as the representatives of the Standard crewmen did.

This situation is unlike that in *Halcyon* where the injured employee was precluded by statute from suing his employer. Here, the tort liability of the United States was not limited by statute; on the contrary, the Government's immunity has been expressly waived for its negligence in this type of case. Under these circumstances, we see no reason for not requiring the United States to contribute toward the damages resulting from its negligent conduct. Therefore, in this noncollision admiralty case where damages are the result of mutual wrongdoing, we hold that contribution will lie where no statute precludes recovery from the joint tortfeasor against whom contribution is sought. *In re Seaboard Shipping Corp.*, 449 F.2d 132, 138-39 (2d Cir. 1971), cert. denied sub nom. *Seaboard Shipping Corp. v. Moran Inland Waterways Corp.*, 406 U.S. 949 (1972); *Horton & Horton, Inc.*, *supra*; *Watz v. Zapata Off-shore Co.*, 431 F.2d 100 (5th Cir. 1970)." (Pages 11-12 of slip opinion)

The Ninth Circuit's decision is significant in the first instance because it leaves the law uniformly settled in every circuit in which the question has been raised concerning the right of contribution among joint tortfeasors in admiralty. Moreover, it underscores the complete lack of authoritative support of Petitioner's position. Petitioner would have this Court eradicate a well-established principle of admiralty jurisprudence on the basis of a construction of this Court's dicta in *Halcyon* which has been explicitly rejected by every appellate court before which it has been urged.

Furthermore, the *Standard Oil* case provides strong testimony for the equitable aspects of the maritime doctrine of contribution. In that case, the claimants chose to pursue their causes solely against Standard, preferring not to sue the Government. Under the district court's holding, Standard would have been required to bear the entire burden of liability for a disastrous loss though the fault of the government was an equally significant cause of the loss. Even had the claimants sued both tortfeasors, there would have been a clear incentive on the part of each to contribute toward settlement rather than suffer a judgment of joint and several liability which could have been satisfied in whole against either. The absence of any right of contribution unconscionably vests in the claimant the arbitrary power to make any one of multiple tortfeasors the "target" defendant upon which liability for all damages may be affixed.

The same situation is presented in the case at bar, where the plaintiff, Sessions, sued only Respondents, though he could also have sued Petitioner directly. The trial court below determined that Sessions' damages were occasioned by the equal fault of Petitioner and Respondents. To deny a right of contribution in such a circumstance would be unreasonable and inequitable, and for this reason admiralty courts have always afforded the remedy of contribution in every case of maritime tort.

CONCLUSION

This Court should affirm the judgment of the United States Court of Appeals for the Fifth Circuit, decreeing that Respondents recover contribution from Petitioner in respect of the damages awarded Troy Sessions by the District Court, as in accord with the well-established ad-

miralty doctrine of contribution among joint tortfeasors. Respondents pray in the alternative (should contribution be improper in the present case) for a rendition of judgment that they recover full indemnity for such damages, together with their reasonable attorney's fees and expenses incurred in the defense of Sessions' claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this _____ day of May, 1974, a true and correct copy of the foregoing was served upon counsel for Petitioner by depositing same in a United States Post Office or mail box, with first class postage prepaid, addressed to Joseph D. Cheavens, of Baker & Botts, 3000 One Shell Plaza, Houston, Texas 77002.

Bruce Dixie Smith

COOPER STEVEDORING CO., INC. v. FRITZ
KOPKE, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

No. 73-726. Argued April 15-16, 1974—Decided May 28, 1974

A longshoreman was injured when, while loading a vessel owned by one respondent and time chartered to the other (hereinafter collectively the Vessel), he stepped into a concealed gap between crates which had previously been loaded by petitioner. The longshoreman then sued the Vessel, which filed a third-party complaint against petitioner. The District Court found both the Vessel and petitioner negligent, and divided the liability equally. On petitioner's appeal, the Court of Appeals affirmed. *Held*: The award of contribution between joint tortfeasors in a noncollision maritime case was proper under the circumstances. On the facts, no countervailing considerations detract from the well-established maritime rule allowing contribution between joint tortfeasors, since where the longshoreman, not being an employee of petitioner, could have proceeded against either the Vessel or petitioner, or both, and thus could have elected to make petitioner bear its share of the damages, there is no reason why the Vessel should not be accorded the same right. *Halcyon Lines v. Haenn Ship Corp.*, 342 U. S. 282, distinguished. Pp. 110-115.

479 F. 2d 1041, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which all Members joined except STEWART, J., who took no part in the decision of the case.

Joseph D. Cheavens argued the cause and filed a brief for petitioner.

Bruce Dixie Smith argued the cause and filed a brief for respondents.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case concerns the extent to which contribution between joint tortfeasors may be obtained in a maritime

action for personal injuries. The S. S. *Karina*, a vessel owned and operated by respondent Fritz Kopke, Inc., and under time charter to respondent Alcoa Steamship Co., was loaded at Mobile, Alabama, with palletized crates of cargo by petitioner Cooper Stevedoring Co. The vessel then proceeded to the Port of Houston where longshoremen employed by Mid-Gulf Stevedores, Inc., began to load sacked cargo. The Houston longshoremen had to use the top of the tier of crates loaded by Cooper as a floor on which to walk and stow the Houston cargo. One of these longshoremen, Troy Sessions, injured his back when he stepped into a gap between the crates which had been concealed by a large piece of corrugated paper.

Sessions brought suit in the District Court against Kopke and Alcoa (hereinafter collectively the Vessel) seeking to recover damages for his injuries.¹ The Vessel filed a third-party complaint against Cooper alleging that if Sessions was injured by any unseaworthy condition of the vessel or as the result of negligence other than his own, such condition or negligence resulted from the conduct of Cooper and its employees. The Vessel also filed a similar third-party complaint against Mid-Gulf.

Prior to trial, Mid-Gulf and the Vessel apparently entered into an agreement under which Mid-Gulf would indemnify the Vessel against any recovery which Sessions might obtain. Pursuant to this agreement, Mid-Gulf was dismissed as a third-party defendant and Mid-

¹ This suit was commenced prior to the enactment of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §§ 901-944 (1970 ed., Supp. II), and all parties agree that the amendments are therefore not applicable. Accordingly we need not decide whether Sessions' suit against the Vessel or the Vessel's third-party complaints against Cooper or Mid-Gulf could be brought under the Act, as amended. See § 905 (b).

Gulf's attorneys were substituted as counsel for the Vessel.²

The case then went to trial, after which the District Court, which sat without a jury, orally announced its findings of fact and conclusions of law. The court found that the Vessel's failure either to make adequate arrangements to assure that the stow would not move and leave spaces in the course of its trip from Mobile to Houston or to put some type of dunnage on top of the stow had resulted in an unsafe place to work and unseaworthy condition. The court found that Cooper was also negligent in not stowing the crates in a manner in which longshoremen at subsequent ports could safely work on top of them. Finding it difficult from the evidence to "evaluate exactly the responsibility between the shipowner on the one hand and Cooper on the other," the District Court divided the liability equally between the Vessel and Cooper.³ Judg-

² Petitioner suggests that the Vessel cannot recover contribution because it has already been fully indemnified for the judgment under its agreement with Mid-Gulf. See W. Prosser, *Law of Torts* §§ 48-49 (4th ed. 1971). But this suggestion rests on a faulty construction of the agreement between the Vessel and Mid-Gulf. The latter agreed to indemnify the Vessel only to the extent necessary after trial of the lawsuit, and the assumption of the parties was that Mid-Gulf would step into the Vessel's shoes both to defend the suit brought by Sessions and to prosecute the third-party complaint against Cooper.

³ Since the District Court concluded that the only apportionment of fault it could reach on the evidence in this case was an equal division, we have no occasion in this case to determine whether contribution in cases such as this should be based on an equal division of damages or should be relatively apportioned in accordance with the degree of fault of the parties. Cf. *The Maz Morris*, 137 U. S. 1, 15 (1890). See also *Jacob v. New York City*, 315 U. S. 752 (1942); *Socony-Vacuum Oil Co. v. Smith*, 305 U. S. 424 (1939); *The Arizona v. Anelich*, 298 U. S. 110 (1936). See generally Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 Calif. L. Rev. 304, 340-344 (1957).

ment was entered allowing Sessions to recover \$38,679.90 from the Vessel and allowing the Vessel to recover \$19,339.95 from Cooper.

Cooper appealed,⁴ asserting that the District Court's award of contribution in a noncollision maritime case was in direct conflict with this Court's decisions in *Halcyon Lines v. Haenn Ship Corp.*, 342 U. S. 282 (1952), and *Atlantic Coast Line R. Co. v. Erie Lackawanna R. Co.*, 406 U. S. 340 (1972). The Court of Appeals rejected this contention, relying on prior decisions of the Fifth and Second Circuits to the effect that the apparent prohibition against contribution in noncollision maritime cases announced in *Halcyon* and *Atlantic* was inapplicable where the joint tortfeasor against whom contribution is sought is not immune from tort liability by statute. See *Horton & Horton, Inc. v. T/S J. E. Dyer*, 428 F. 2d 1131 (CA5 1970), cert. denied, 400 U. S. 993 (1971); *Watz v. Zapata Off-Shore Co.*, 431 F. 2d 100 (CA5 1970); *In re Seaboard Shipping Corp.*, 449 F. 2d 132 (CA2 1971), cert. denied, 406 U. S. 949 (1972). The Court of Appeals found this principle applicable here since Sessions, in addition to suing the Vessel, could have proceeded directly against Cooper as the latter was not his employer

⁴The Vessel also cross-appealed, contending that the District Court should have allowed it full indemnity from Cooper. The Court of Appeals rejected this argument, relying on the District Court's finding that the Vessel's "conduct precluded its full recovery on the indemnity claim because it failed to fulfill its primary responsibility under its arrangement with Cooper to assure that some type of dunnage was placed on top of the cargo." 479 F. 2d 1041, 1042. Cf. *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 355 U. S. 563, 567 (1958). The Vessel did not file a petition for a writ of certiorari to seek review of this aspect of the Court of Appeals' judgment, and we therefore lack jurisdiction to consider its contention that it is entitled to recover full indemnity on the basis of *Ryan Stevedoring Co. v. Fan-Atlantic S. S. Corp.*, 350 U. S. 124 (1956).

and, therefore, not shielded by the limited liability of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 905. 479 F. 2d 1041 (1973). We granted certiorari to consider this question, 414 U. S. 1127 (1974), and now affirm.

Where two vessels collide due to the fault of each, an admiralty doctrine of ancient lineage provides that the mutual wrongdoers shall share equally the damages sustained by each. In *The North Star*, 106 U. S. 17 (1882), Mr. Justice Bradley traced the doctrine back to the Laws of Oléron which date from the 12th century, and its roots no doubt go much deeper. Even though the common law of torts rejected a right of contribution among joint tortfeasors, the principle of division of damages in admiralty has, over the years, been liberally extended by this Court in directions deemed just and proper. In one line of cases, for example, the Court expanded the doctrine to encompass not only damage to the vessels involved in a collision, but personal injuries and property damage caused innocent third parties as well. See, e. g., *The Washington*, 9 Wall. 513 (1870); *The Alabama*, 92 U. S. 695 (1876); *The Atlas*, 93 U. S. 302 (1876); *The Chattahoochee*, 173 U. S. 540 (1899). See generally *The Max Morris*, 137 U. S. 1, 8-11 (1890). In other cases, the Court has recognized the application of the rule of divided damages in circumstances not involving a collision between two vessels, as where a ship strikes a pier due to the fault of both the shipowner and the pier owner, see *Atlee v. Packet Co.*, 21 Wall. 389 (1875), or where a vessel goes aground in a canal due to the negligence of both the shipowner and the canal company, see *White Oak Transp. Co. v. Boston, Cape Cod & New York Canal Co.*, 258 U. S. 341 (1922). See also *The Max Morris*, *supra*, at 13-14. Indeed, it is fair to say that application of the rule of division of damages between

joint tortfeasors in admiralty cases has been as broad as its underlying rationales. The interests of safety dictate that where two parties "are both in fault, they should bear the damage equally, to make them more careful." *The Alabama*, *supra*, at 697. And a "more equal distribution of justice" can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame. See *The Max Morris*, *supra*, at 14.

Despite the occasional breadth of its dictum, our opinion in *Halcyon* should be read with this historical backdrop in mind. Viewed from this perspective, and taking into account the factual circumstances presented in that case, we think *Halcyon* stands for a more limited rule than the absolute bar against contribution in noncollision cases urged upon us by petitioner.⁵

In *Halcyon*, a ship repair employee was injured while making repairs on *Halcyon's* ship. He sued *Halcyon* for damages, alleging negligence and unseaworthiness. Since the employee was covered by the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §§ 901-950, he was prohibited from suing his employer *Haenn*. Nevertheless *Halcyon* impleaded *Haenn* as a joint tort-

⁵ The lower courts have generally not read *Halcyon* as petitioner suggests, and have continued to recognize a right of contribution in noncollision maritime cases. See, e. g., *Crain Bros., Inc. v. Wieman & Ward Co.*, 223 F. 2d 256 (CA3 1955); *Moran Towing Corp. v. M. A. Gammino Constr. Co.*, 409 F. 2d 917 (CA1 1969); *Coca Cola Co., Tenco Div. v. S. S. Norholt*, 333 F. Supp. 946 (SDNY 1971); *Dow Chemical Co. v. Tug Thomas Allen*, 349 F. Supp. 1354 (ED La. 1972); *Bilkay Holding Corp. v. Consolidated Iron & Metal Co.*, 330 F. Supp. 1313 (SDNY 1971); *American Independent Oil Co. v. M. S. Alkaid*, 289 F. Supp. 329 (SDNY 1967); *Cities Service Refining Corp. v. National Bulk Carriers, Inc.*, 146 F. Supp. 418 (SD Tex. 1956).

feason seeking contribution for the judgment recovered by the employee. We granted certiorari in *Halcyon* to resolve a conflict which had arisen among the circuits as to whether a shipowner could recover contribution in these circumstances. See 342 U. S., at 283-284, and n. 3. One court had held that the employer's limitation of liability *vis-à-vis* its employee under the Harbor Workers' Act barred contribution. See *American Mutual Liability Insurance Co. v. Matthews*, 182 F. 2d 322 (CA2 1950). Another circuit had held that the Act did not bar contribution, see *United States v. Rothschild Int'l Stevedoring Co.*, 183 F. 2d 181 (CA9 1950), and yet a third circuit, in the case reviewed in *Halcyon*, had permitted contribution but limited it to the amount which the injured employee could have compelled the employer to pay had he elected to claim compensation under the Act. 187 F. 2d 403 (CA3 1951).

Before this Court, both parties in *Halcyon* agreed that "limiting an employer's liability for contribution to those uncertain amounts recoverable under the Harbor Workers' Act is impractical and undesirable." 342 U. S., at 284. The Court also took cognizance of the apparent trade-off in the Act between the employer's limitation of liability and the abrogation, in favor of the employee, of common-law doctrines of contributory negligence and assumption of risk. *Id.*, at 285-286. Confronted with the possibility that any workable rule of contribution might be inconsistent with the balance struck by Congress in the Harbor Workers' Act between the interests of carriers, employers, employees, and their respective insurers, we refrained from allowing contribution in the circumstances of that case.

These factors underlying our decision in *Halcyon* still have much force. Indeed, the 1972 amendments to the Harbor Workers' Act re-emphasize Congress' determina-

tion that as between an employer and its injured employee, the right to compensation under the Act should be the employee's exclusive remedy.* But whatever weight these factors were properly accorded in the factual circumstances presented in *Halcyon*, they have no application here. Unlike the injured worker in *Halcyon*, Sessions was not an employee of Cooper and could have proceeded against either the Vessel or Cooper or both of them to recover full damages for his injury. Had Sessions done so, either or both of the defendants could have been held responsible for all or part of the damages. Since Sessions could have elected to make Cooper bear its share of the damages caused by its negligence, we see no reason why the Vessel should not be accorded the same right. On the facts of this case, then, no countervailing considerations detract from the well-established maritime rule allowing contribution between joint tortfeasors.

Our brief *per curiam* opinion in *Atlantic Coast Line R. Co. v. Erie Lackawanna R. Co.*, 406 U. S. 340 (1972), is fully consistent with this view. In that case a yard brakeman, employed by Erie, brought suit for injuries

* Under the 1972 amendments, an employee injured on a vessel can bring an action against the vessel for negligence, but the vessel's liability will not be based upon the warranty of seaworthiness or breach thereof. And where the vessel has been held liable for negligence "the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void." 33 U. S. C. § 905 (b) (1970 ed., Supp. II). The intent and effect of this amendment was to overrule this Court's decisions in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946), and *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp.*, 350 U. S. 124 (1956), insofar as they made an employer circuitously liable for injuries to its employee, by allowing the employee to maintain an action for unseaworthiness against the vessel and allowing the vessel to maintain an action for indemnity against the employer. See H. R. Rep. No. 92-1441, pp. 4-8 (1972); S. Rep. No. 92-1125, pp. 8-12 (1972).

sustained while working on a boxcar owned by another railroad, Atlantic, while the boxcar was being transported on a carfloat barge owned by Erie. The accident was allegedly due to a defective footboard and handbrake of the boxcar and the plaintiff sued Atlantic for its negligence in supplying defective equipment. Atlantic sought contribution from Erie on the ground that its negligence was also a factor in causing the injury. The District Court denied contribution, relying on *Halcyon*. The Court of Appeals affirmed and we granted certiorari because it initially appeared that the decision was inconsistent with the Court of Appeals' decisions in *Horton*, *Watz*, and *Seaboard*, *supra*, which had allowed contribution, notwithstanding *Halcyon*, in situations where the party against whom contribution was sought was not entitled to the limitation-of-liability protections of the Harbor Workers' Act. After oral argument, however, it appeared that the case was factually indistinguishable from *Halcyon*. Erie, against whom contribution was sought, was the plaintiff's employer, and in *Pennsylvania R. Co. v. O'Rourke*, 344 U. S. 334 (1953), we recognized that a railroad employee injured while working on a freight car situated on a carfloat in navigable waters was subject exclusively to the Harbor Workers' Act. Erie was therefore entitled to the limitation-of-liability protections of the Harbor Workers' Act, just like the employer in *Halcyon*.

Petitioner argues, however, that this protection was ephemeral in *Atlantic* since, under *Jackson v. Lykes Bros. S. S. Co.*, 386 U. S. 731 (1967), the injured employee in *Atlantic* could have sued Erie, the shipowner-employer, for unseaworthiness of the vessel. See also *Reed v. The Yaka*, 373 U. S. 410 (1963). But the fact that Erie may have been subject to a suit based on unseaworthiness for damages caused by defective box-

car appliances, compare *The Osceola*, 189 U. S. 158, 175 (1903), with *Gutierrez v. Waterman S. S. Corp.*, 373 U. S. 206, 213 (1963), did not make it a joint tortfeasor subject to a contribution claim. Contribution rests upon a finding of concurrent fault. Erie's liability, if any, for unseaworthiness of its vessel would have been a strict liability not based upon fault. In other words, even if Erie were negligent, its injured employee was entitled to claim compensation from it under the Harbor Workers' Act, and Erie was accordingly entitled to the protective mantle of the Act's limitation-of-liability provisions. And to the extent Erie was not negligent but nevertheless subject to a suit on a seaworthiness theory, Erie was not a joint tortfeasor against whom contribution could be sought. See *Simpson Timber Co. v. Parks*, 390 F. 2d 353 (CA9), cert. denied, 393 U. S. 858 (1968).

In sum, our opinion in *Atlantic* was not intended to answer the question posed by the present case, as its failure to discuss *Horton*, *Watz*, and *Seaboard* indicates. Rather, *Atlantic* proves only that our decision in *Halcyon* was, and still is, good law on its facts.

Affirmed.

MR. JUSTICE STEWART took no part in the decision of this case.